VENTURE CAPITAL INVESTMENT AND SMALL BUSINESS AFFILIATION RULES

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Why a limited exception is crucial to economic recovery efforts.
Unlike their underfinanced counterparts, venture capital companies (VCCs) are well financed and what they lack in technical capability, they make up for in business acumen and financial wherewithal. Moreover, risky investments with large upsides are exactly the type of opportunities that can produce significant returns for venture capital funds.

In the commercial marketplace, many small businesses receive venture capital infusions to transform their ideas and research into viable products. This same principle should apply to federal procurement, where U.S. government procurement policies favor small contracting, but early-stage research and development funding is difficult to come by. VCC investment should be utilized to fill the gap between government policy and economic reality by supporting early-stage funding for small businesses. This type of investment would increase the pool of potential small businesses for federal procurement and help to diversify the government’s contractor portfolio resulting in a positive impact on a fundamental tenet of government procurement: competition. There are technological benefits as well. With the assistance of venture capital investments, small companies would have the freedom to develop cutting-edge technologies for the federal government which larger, more established corporations may be either unwilling or unable to develop.

However, the mutually beneficial relationship between small business contractors and VCCs has been frustrated due to a complicated web of government regulations that, while well intended, have the effect of holding back promising small businesses in the federal marketplace. In this harsh economic climate, venture capital is crucial to small, innovative businesses. Although VCCs have felt the impact of the recession, they remain well equipped to aid small concerns and their assistance is imperative. As a result, now is the time to advance a compromise position that protects small business programs while encouraging venture capital investment in federal contractors.
Federal agencies are encouraged to set aside contracts for small businesses. These set asides limit competition to small businesses based on employee- or revenue-based metrics. Standing alone, the small businesses that receive venture capital investment are, in fact, “small” as measured by employees or revenue. Similarly, venture capital firms are often, at least by number of employees, thinly staffed small businesses. However, many small businesses that receive investments from similarly small VCCs are deemed to be “large,” and, as a result, ineligible for set-aside awards by the Small Business Administration (SBA). If both VCC firms and their investment targets are small, why is there a barrier to investing in small businesses that perform set-aside contracts? The answer is “affiliation.”

Affiliation is a concept developed to prevent small firms that are closely related to large firms from being awarded small business contracts, and requires SBA to analyze a company’s size status by adding together the employees and revenue of related firms. More often than not, this analysis results in a determination that changes a company’s size status from small to “other than small” without any actual change in that firm’s employee count or revenues.

Affiliation is particularly relevant to the small business/venture capital relationship because SBA frequently finds VCCs to be affiliated with not only a single small business, but also with the other portfolio businesses in which they invest. This concept is vital for small businesses and venture capital investors to understand because once a small firm is deemed affiliated with a VCC, it will often exceed SBA’s size standards, lose its small business size status, and can no longer compete for set-aside work. This is likely to make the business a less profitable enterprise and a less attractive investment.

How does SBA calculate affiliation? The answer is not entirely clear and is generally very fact-specific. In cases where the small business is not majority owned by a single investor, SBA regulations note merely that it will examine the “totality of the circumstances” to determine if two (or more) businesses should be considered affiliated, and thus a single entity. The regulations do, however, list some factors that, when present, increase the risk of two businesses being found to be affiliated. These factors include:

- Control,
- Ownership,
- Management, and
- Contractual relationships.

When VCCs invest in small businesses, the “control” factor often results in a finding of affiliation. Most VCCs require some level of control as a condition of their investment in a particular company. However, because
small business set asides minimize competition, these same investors would prefer that the target small business retain its status. There is, therefore, a constant struggle to strike an appropriate balance between protecting an investment without triggering the “control” factor and jeopardizing the small business’s size status. Complicating this issue further is the fact that, for the purposes of affiliation, it does not matter whether control is exercised, as long as the power to control exists.

Typically, a VCC will be found to control, and thus be affiliated with, a platform business through stock ownership. Stock ownership may lead to affiliation under a variety of circumstances, including when an entity owns a block of stock that is larger than other outstanding blocks of voting stock. That said, ownership of less than 50 percent of the voting stock of an entity is not a safe haven from affiliation. Rather, if two or more individuals or entities own, control, or have the power to control less than 50 percent of a business’s voting stock, SBA may make the counterfactual presumption that both individuals or entities control or have the power to control a small business. One caveat to this is that if a business’s voting stock is widely held and no single block of stock is “large” (when compared with all other holdings), the business’s board of directors and CEO or president will, in the absence of evidence to the contrary, be deemed to have the power to control the business.

Control and affiliation may also be attributed to individuals who do not own stock in a particular concern. For example, VCC investors will often require that employees of a particular fund serve on the board of portfolio companies. This is risky because SBA will find two concerns to be affiliated when one or more officers, directors, or general partners of one concern control the board of directors and/or the management of one or more other concerns. A further twist on this concept is that interests may be combined based on “identity of interest.” Individuals with an “identity of interest” affiliation may be found when individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) are treated as one party because such interests are aggregated. This determination may be rebutted with evidence that demonstrates the interests are separate.

Another complication is that control can be either “affirmative” or “negative.” Affirmative control is straightforward and will be found by SBA if, for example, the VCC owns the majority of voting stock, controls the board of directors, or if VCC approval is necessary before the company can make certain business decisions. Negative control, on the other hand, involves more subtle factors and may be challenging for VCC investors that rely on indirect methods to protect investments in portfolio companies. SBA’s regulations provide that a concern has negative control and is affiliated...
When, “though lacking affirmative ability to approve actions, it can block corporate action by the other concern.” In determining whether a concern has negative control over another concern, SBA considers the following factors:

- Whether the affiliate has veto power,
- Can block or deadlock the board’s actions, or
- Can prevent a quorum at the shareholder or board of directors meetings.

SBA will also address the size of the other blocks of stock, whether there are any agreements that limit the amount of control the affiliate has over the concern, and the number of directors the alleged affiliate has on the board.

While many venture capital firms have raised creative arguments to avoid findings of affiliation, most have failed. For example, many VCCs have argued that they are exempt from affiliation based on the exception found at 13 C.F.R. §121.103(b)(5)(i) “for venture capital operating companies (VCOCs) that provide financial, management, or technical assistance under the Small Business Investment Act of 1958.” This argument has repeatedly failed because SBA’s regulations explicitly limit the exception to “VCOCs,” as defined by the Department of Labor regulations.

VCCs have also argued that their passive “control” in a small business does not constitute affiliation, but this claim has been repeatedly rejected by SBA. According to SBA, it is not relevant that VCCs are passive investors if they have the potential to control a small business. For example, in Size Appeal of TSP TWO, Incorporated, the contractor argued that it was not affiliated with two different companies—one of which was a holding company. The holding company owned 74 percent of the contractor’s stock and characterized itself as an “investment entity” without an active role in the management or operation of the contractor’s business. SBA determined that the holding company was an affiliate for purposes of SBA size determinations, basing its finding, in part, on the fact that the regulations consider an entity “affiliated” if it controls or has power to control 50 percent or more of the contractor’s voting stock.

The affiliation rules place VCCs in a difficult position. By their nature, VCCs not only invest but want to participate to varying degrees in the management of their portfolio businesses. A VCC cannot own a majority of the small concern’s stock or assume a majority position on the board of a small government contractor, however, because of the risk that a target small business will be found affiliated with the company and each of its portfolio businesses. Moreover, under SBA’s current interpretation of its
regulations, VCCs cannot safely install market-standard negative covenants without risking a negative control finding. This regulatory strait jacket is a significant impediment to investment, which limits the growth of small businesses involved in government contracting.  

**CURRENT LEGISLATIVE AND EXECUTIVE INITIATIVES IN SUPPORT OF VENTURE CAPITAL**

Recent legislative changes proposed by Congress and statements made by the Obama administration suggest a more favorable view toward the small business/venture capital relationship. On the legislative front, Congress has proposed amendments to the Small Business Act that would permit VCCs to invest in small businesses without triggering affiliation. The proposed amendments apply to small businesses that participate in the Small Business Innovation Research (SBIR) program. The SBIR program ensures that small, high-tech, innovative businesses receive a significant portion of the federal government’s research and development funds. Current SBIR regulations require participating small businesses to be at least 51-percent owned and controlled by “natural persons” who are either U.S. citizens or permanent resident aliens of the United States; or, at least 51-percent owned and controlled by another business concern that is at least 51-percent owned and controlled by “natural persons” who are either U.S. citizens or permanent resident aliens of the United States.

The SBIR/STTR Reauthorization Act of 2009 included proposed amendments to affiliation designed to encourage venture capital investment in small businesses. Specifically, the legislation provided that a business concern would not be considered affiliated with a VCOC if the VCOC owns less than 50 percent of the business and employees of the VCOC do not constitute a majority of the concern’s board of directors. Unlike the current affiliation principles, this legislation indicates that affiliation in some circumstances may be narrowly tied to stock ownership and seats on the board of directors. The other factors of affiliation, including negative covenants and management control, are notably absent from the language of the bill. Although this legislation does not apply to all small businesses, it does indicate congressional intent that, for SBIR participants receiving specific types of venture capital funding, many of the affiliation factors may soon no longer apply.

The Obama administration has also made statements that signal its support of venture capital. The administration has stated that it plans to improve the procurement system to attract venture capital-backed companies and increase minority-owned business access to venture capital. In addition, the president has appointed individuals with venture-capital backgrounds to several key positions; two such examples include SBA appointees Karen Mills and Winslow Sargeant. These appointments indicate the administration’s support for venture capital. Indeed, Sargeant has specifically voiced his support for the inclusion of venture capital investments in SBIR participants. These factors, while not dispositive, imply the administration holds a favorable view toward the role of venture capital in the procurement system.

The SBIR/STTR Reauthorization Act of 2009 also includes language designed to encourage venture capital investment in small businesses. Specifically, Section 103 of the legislation indicates that affiliation in some circumstances may be narrowly tied to stock ownership and seats on the board of directors. Although this legislation does not apply to all small businesses, it does indicate congressional intent that, for SBIR participants receiving specific types of venture capital funding, many of the affiliation factors may soon no longer apply.

A close read of the Small Business Investment Act of 1958 makes it difficult to understand why SBA has failed to exempt VCCs from affiliation. Specifically, Section 103 of the statute states:

> (i) shall not cause a business concern to be deemed not independently owned and operated regardless of the allocation of control during the investment period under any investment agreement between the business concern and the entity making the investment; (ii) shall be disregarded in determining whether a business concern satisfies size standards established pursuant to section 3(a)(2) of the Small Business Act; and (iii) shall be disregarded in determining whether a small business concern is a smaller enterprise...

The plain language of this provision appears to expressly exempt VCC-owned concerns from affiliation rules.

Created by Congress in 1953, SBA is tasked primarily with the role of aiding, counseling, assisting, and protecting the interests of small business concerns. In other words, “SBA helps Americans start, build, and grow businesses.” Contrary to its founding principles, however, SBA’s affiliation rules impair the ability of small businesses to obtain capital. Specifically, when small government contractors obtain capital infusions from VCCs, the investment is likely to change the business’s size status to “other than small” under SBA size standards. This new size status may result in the loss of government

**AFFILIATION REGIME AND THE NEGATIVE IMPACT ON VENTURE CAPITAL**

There is no doubt that the current economic climate has made it difficult for small businesses to raise capital from banks and other lenders. In the federal marketplace, this tightening has been exacerbated by the fact that the small business contractors who are able to locate venture capital financing are penalized for that support. Despite recent initiatives that support venture capital investments in small concerns, the current legislative regime limits the ability of small businesses to obtain capital without impacting their size status. This means companies must forgo venture capital financing or risk losing eligibility to compete for small business set aside contracts and subcontracting opportunities with prime contractors who seek to meet small business subcontracting goals. As a result, some of the most innovative small businesses are disqualified from participating in federal programs simply because they receive no venture capital funding.
contracts that have been set aside for small businesses or those in which the agency requires performance by a small business in order to satisfy its small business goals. Moreover, the loss of size status makes the business less attractive to prime contractors interested in the concern only to satisfy their small business subcontracting goals. This not only eliminates the small business’s prime contracting opportunities, but also its subcontracting opportunities.

Although SBA claims the affiliation rules are designed to protect the interests of small businesses, when VCC investments are involved, the result is to the contrary. The small business loses its attraction when its size status and its size-dependent contracts are lost. This result is in direct contravention of SBA’s policy goals: it harms rather than protects small business interests.

A PROPOSAL FOR CHANGE
The government currently excludes most VCC-backed small businesses from competing for small business contracting opportunities, regardless of their potential to provide high-quality products, services, and solutions. It is at best illogical that the government penalizes small businesses because they have demonstrated significant market potential and received VCC funding. Well-meaning but misapplied small business regulations have the practical effect of eliminating small businesses that receive VCC backing from competing for small business contracts, and forces the small businesses to compete against large corporations for contracting opportunities. Given that small businesses cannot compete on the same level as their larger corporate counterparts, such as Lockheed Martin Corporation or General Dynamics, the small concerns are likely to lose these procurement opportunities and the government will lose out on new and advantageous business partnerships.
Despite their shortcomings, SBA’s affiliation rules should not be eliminated entirely because they serve an important purpose. The government has an interest in ensuring that the small businesses which receive set-aside contracts are, in fact, small businesses. Moreover, the government must ensure that legitimate small businesses are not forced out of the federal marketplace by large businesses using small business fronts. The affiliation rules, while clearly over-inclusive, are effective in preventing this type of activity. At the same time, the current affiliation rules are holding many small businesses back from their potential and are limiting the types of innovate goods and services that can be offered to the federal government.

To remedy this problem, the government must revise existing legislation and regulations to eliminate unreasonable restrictions on VCC-backed small business concerns while maintaining a regulatory regime that protects all small businesses. While encouraging VCC investment, an effective proposal cannot have the effect of squeezing out small businesses that lack such financing. Rather, the solution that we propose attempts to strike a balance between these opposing positions. While there may be no perfect balance, regulatory reform focused on updating the concept of affiliation may provide venture capital access while maintaining the independence of small businesses. This balance, particularly during the current economic downturn, will provide much needed capital and spur small business growth.

One way to optimize venture capital involvement in small business government contracts is to provide VCC companies with a blanket exception to affiliation. This solution would permit the participation of a VCC-backed small business, regardless of the percentage of the business controlled by a VCC. This type of waiver would, however, allow VCCs the unfettered ability to create a series of business fronts to compete for small business set-asides. Large businesses could also create private equity funds and use these funds to access set-aside work. Neither of these scenarios, however, does anything to inspire entrepreneurs to start small businesses, encourage innovation, or promote small business growth. Rather, an unlimited VCC affiliation waiver would squeeze independent small businesses out of government contracts, and consume available venture capital.

A more nuanced approach, modeled after waivers of the “non-manufacture rule,” would have a more salutary effect on the type of venture capital activity small businesses so desperately need while not foreclosing federal contracting opportunities. Under the “non-manufacture rule,” in order to qualify as a small concern for a small business set-aside or an 8(a) contract to provide manufactured products, an offeror must be the manufacturer of the end item. SBA may waive non-manufacture rule requirements if it “determines that no small business manufacturer or processor of the product or class of products is available to participate in the federal procurement market.” These waivers are specifically tailored to select North American Industry Classification System (NAICS) codes where SBA has determined that there are no small business manufacturers. This waiver process takes place largely in public, with notices required to be published in Commerce Business Daily and the Federal Register before they are granted. Further, these waivers are not granted and forgotten. Rather, “non-manufacture rule” waivers are subject to challenge by private individuals and are periodically reviewed by SBA. A similar public process could be created with regard to waiver of the affiliation rules for VCCs. This system would have clear benefits over both current affiliation rules and an overall affiliation waiver. Affiliation waivers would be limited to NAICS codes in which SBA determines that the class of product or service requires significant capital investments that would not be possible without venture capital involvement. For example, the venture capital community often argues that there should be a blanket affiliation waiver for all VCCs because some industries, such as biotechnology, require significant startup capital that is unlikely to be available from traditional sources. While a blanket affiliation waiver would be over-inclusive, a specific waiver for biotechnology-related NAICS codes would increase access to venture capital funding while limiting crowding out of small businesses...
in other less capital intensive industries. In addition, these waivers have the benefit of being the result of public notice and comment, which will allow small businesses to directly impact the waiver process. The waivers, once granted, would be subject to periodic review to determine if significant venture capital involvement is still required. Independent small businesses working under specific NAICS codes could also challenge existing waivers as traditional funding becomes available.

With a NAICS code–based affiliation waiver, VCCs would have the freedom to take a majority stock position in small businesses. VCCs could also impose affirmative and negative controls, which are central to protection of their investment in risky small businesses. These incentives, coupled with the ability to compete for small business set-asides, have the potential to increase venture capital involvement in areas where capital is key—especially during this time of economic downturn.

CONCLUSION

In this harsh economic climate, small businesses need assistance to weather the rough financial storm and VCC firms bring managerial, technical, and financial expertise to their portfolio companies without managing the day-to-day operations of small concerns. The beneficial nature of this relationship should not be hampered by a flawed regime based on absolutes which excludes VCC-backed small businesses from small business contracting opportunities. Nydia Velazquez, co-chair of the House Small Business Committee, said it best when she stated: “small firms must not be penalized for accepting investment they need to advance their R&D efforts.”

An exception to the affiliation rules must be made for VCC-backed firms if small businesses are to succeed in the current market. While a blanket exemption is not necessary, limited exemptions based on a firm’s particular service or product is more than warranted. This solution will allow small businesses to obtain much-needed capital, while still remaining eligible to compete for small business contracts. CM

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ENDNOTES

1. See U.S. Small Business Administration, “Get Ready,” available at www.sba.gov/smallbusinessplanner/plan/getready/SERV_SBPLANNER-NER_ISSN1FORU.html (explaining that “Starting a small business is always risky, and the chance of success is slim. According to the U.S. Small Business Administration, roughly 50% of small businesses fail within the first five years.”).


3. Ibid.

4. See Peter Schnitzler, “The Recession’s Domino Effect,” Indianapolis Business Journal (May 11, 2009), available at www.allbusiness.com/economy-economic-indicators/economic-conditions-recession/12345515-1.html (explaining that “With less money available at the source, professional venture capitalists are hanging on to what they’ve got. And their priorities are changing. Rather than take risky bets on promising new technologies, [VCCs] are hunkering down, trying to make the most of what’s already in their coffers.” Still, although VCCs may be less likely to invest in risky projects, they have a unique ability to adapt to circumstances and will be a much relied-upon source of revenue for small businesses.


6. See 13 C.F.R. §121.201 (listing size standards).


8. 13 C.F.R. §121.103(a)(5); 13 C.F.R. §121.103(a)(5) (2010), Size Appeal of: Lance Bailey & Associates, Inc., SBA No. SIZ-4817 (2006) (“Affiliation through the totality of the circumstances means that if the evidence is insufficient to show affiliation for a single independent factor (13 C.F.R. §121.103(c)(1), (d), (e), (f), or (g)), the SBA may still find the businesses affiliated under the totality of the circumstances where the interactions between the businesses are so suggestive of reliance as to render the businesses affiliates.”). In Lance Bailey, the court made clear, however, that “totality of the circumstances is not an independent basis of affiliation” and that the “independent bases of affiliation...are the nucleus of a finding of affiliation through the totality of the circumstances.” (Ibid.)

9. See 13 C.F.R. §121.103.

10. Venture Impact, The Economic Importance of Venture Capital-Backed Companies to the U.S. Economy (HIS Global Insight, fifth ed.) (“Typically, VCs take seats on the boards of their portfolio companies and participate actively in firm management.”).

11. 13 C.F.R. §121.103(a)(1); see also Pine Products Corp. v. U.S. 19 Cl.Ct. 691, 695–96 (1990) (discussing how the control factor is applied to joint ventures).

12. 13 C.F.R. §121.103(c).

13. For example, when a person, business, or entity owns, or has the power to control, 50 percent or more of a small business’s voting stock, the two concerns will be found to be affiliated. (13 C.F.R. §121.103(c)(1)).


15. If these minority holdings are equal or approximately equal in size, and the aggregate of these holdings is “large,” as compared with other stock holdings, SBA will find control. See Size Appeal of Fortera Systems, Inc., Ibid.

16. 13 C.F.R. §121.103(c)(3); see also Size Appeal of: Eagle Pharm., Inc., SBA No. SIZ-5023 (2009). The three largest blocks of stock are: Investor 1: 35.7 percent; Investor 2: Block which aggregated totals 34.5 percent; and Investor 3: 7.2 percent. Appellant’s ownership structure would quickly run afoul of the multiple-largest minority shareholder rule, because the [Investor-1] and [Investor-2] Block holdings would be “equal or approximately equal in size” and their aggregate would be “large as compared with any other stock holding.” Company tries to argue widely held rule applies. Court dismisses the argument, though the Investor 2 block consists of over 20 shareholders, this is not the definition of “widely held.”

17. 13 C.F.R. §121.103(e).

18. Ibid.

19. 13 C.F.R. §121.103(f); see also Size Appeal of: Taylor Consultants Inc., SBA No. SIZ-5049 (2009).

20. Ibid.
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22. However, see Size Appeal of: Cyte! Software, Inc., SBA No. SIZ-4837 (2007) (The SBA Board determined that though the VCC had a role in appointing three people on the board, that alone did not result in negative control).

23. Though a concern does not possess a specific talisman of control, like the majority of voting stock, it controls the alleged affiliate because the business “is not entirely free to conduct its business as it chooses.” See Size Appeal of: Regent Mfg., SBA No. SIZ-4533 (2003).

24. 13 C.F.R. 121.103(a)(3); see also Size Appeal of: Eagle Pharm, Inc., SBA No. SIZ-5023 (2009) (finding negative control when a stockholder invests a payment of dividends and creation of debt); Regent Mfg., Inc., SBA No. SIZ-4533 (2003). (Although not a VCC case, SBA found negative control when a board required the concurrence of all board members in order to appoint an independent member.) However, see Size Appeal of: Ed Eng’g, Inc., & Tech., Inc., SBA No. SIZ-4973 (2008) (finding where supermajority approval requirements for certain fundamental corporate actions not required for decisions regarding daily operations of the business did not constitute negative control).

25. See Size Appeal of: Dell-Star Corp., SBA No. 2663 (1987) (finding that although the affiliate VCC had a minority interest of stock, through agreement, it had a majority position on the board).

26. See, e.g., Size Appeal of: TSP TWO, Inc., SBA No. 3009 (November 29, 1988) (explaining that the definition of “affiliates” in 13 C.F.R. §121.103 (previously §121.3) contains no exemption for venture capital firms); Size Appeal of Union Metal Corporation, SBA No. 2578 (December 22, 1986) (“We have consistently held that investment companies, or holding companies, and the firms they own are subject to the affiliation rules because of the power of one to control the other or others.”)

27. See Size Appeal of: International Laser Machines Corp., SBA No. 2541 (November 7, 1986) (rejecting the argument that because a venture capital sponsor was merely a passive investor, it did not have the power to control the contractor and finding that investment/holding companies are not “within the terms of the specific exemptions in the size regulations...subject to affiliation rules”).

28. Ibid.

29. SBA No. 3009 (November 29, 1988).

30. Ibid.

31. SBA also noted that the definition of affiliates found in the size regulations does not provide an exemption for venture capital firms and explained that there was no evidence to suggest that the investment company was exempt under the Small Business Investment Act of 1958 or the Investment Company Act of 1940. (Ibid.)

32. “Venture Impact, The Economic Importance of Venture Capital-Backed Companies to the U.S. Economy” (HS Global Insight, fifth edition) (“Typically, [VCCs] take seats on the boards of their portfolio companies and participate actively in firm management.”).

33. See Keric B. Chin and Richard J. Vacura, “Small Business: SBA Rules to Continue to Impact Ability of Small Businesses to Raise Capital,” BNA’s Federal Contracts Report Analysis & Perspective (August 25, 2009), available at Westlaw, 92 FCR 152 (discussing factors investors should consider when making investment, including: percent of ownership; the implications of shareholder voting agreements, corporate charters, and bylaws; common management; and mutual business or economic interests. There are no bright lines or clearly delineated safe harbors to guide small businesses and investors).

34. See SBIR/STTR Reauthorization Act of 2009, H.R. 2956, 111th Cong. (as passed by the House on July 8, 2009, and Senate on July 13, 2009).


36. See 13 C.F.R. §121.702(a).


38. Ibid. The bill also states that a “VCOC controlled by a business with more than 50 employees has an ownership interest in a small business owned in majority by VCOCs, that small business is eligible to receive an SBIR or STTR award only if: 1) not more than two of such VCOCs have an ownership interest in the small business, and 2) such VCOCs do not collectively own more than 20 percent of the small business.”


40. Karen Gordon Mills, the current administrator of SBA, is a former private equity investor and adviser and the former founding partner and managing director of Solera Capital, a New York-based venture capital firm (www.washingtonpost.com/wp-dyn/content/article/2006/12/19/AR2006121902112.html). Winslow Sargent, the former managing director at the venture firm Venture Investor’s LLC, was appointed by the president as SBA chief counsel for advocacy.

41. Subject to affiliation rules.”

42. SBA Office of Advocacy: “Impact of Tight Money and/or Recession on Small Business” (June 2009), available at www.sba.gov/advo/research/rs230tot.pdf (“Smaller businesses rely more on bank lending as a source of credit than do larger firms. As a consequence, smaller businesses may be more adversely affected when tighter monetary policies or adverse conditions in banking reduce the overall supply of bank loans.”). See also Keric B. Chin and Richard J. Vacura. “Small Business: SBA Rules to Continue to Impact Ability of Small Businesses to Raise Capital,” BNA’s Federal Contracts Report Analysis & Perspective (August 25, 2009), available at Westlaw, 92 FCR 152.


44. See Chin & Vacura, op. cit., at 1.

45. Ibid.

46. Ibid.

47. See, e.g., Chapman, “Obama Appoints Venture Capital Executive to Head Small Business Administration,” HuffingtonPost.com (December 23, 2008) (arguing that by allowing VCC-backed small businesses to participate in the small business contracting regime, “billions of dollars [will be diverted] away from the middle class economy and into the hands of wealthy investors.”).

48. 13 C.F.R. §121.106(a)(1).

49. 13 C.F.R. §121.106(b)(3)(i).

50. 13 C.F.R. §121.1204(a)(4)(i).

51. 13 C.F.R. §121.1204(a)(7).