

## **AFFILIATION BASED ON IDENTITY OF INTEREST: COMMON INVESTMENT OR ECONOMIC DEPENDENCE**

Copyright Richard D. Lieberman, Consultant and Retired Attorney

Two recent cases at the Small Business Administration Office of Hearings and Appeals (“OHA”) address affiliation of companies based on “identity of interest” and discuss two different aspects—common investments and economic dependence. They are instructive in the ways in which a business may find itself “not small” under the SBA rules. Readers of this blog are well aware that in determining a company’s size, “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates....” 13 CFR §121.103 (a)(6). The SBA rules include affiliation based on “identity of interest” as follows:

*Affiliation based on identity of interest.* Affiliation may arise among two or more persons with an identity of interest. 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) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 CFR § 121.103(f).

**Affiliation through economic dependence.** In *Core Recoveries, LLC*, SBA No. SIZ-5723, March 21, 2016, OHA considered whether Core Recoveries was affiliated through economic dependence with West Asset Management, a large business. Core Recoveries is a national collection agency which obtained “account placements” (receipts) from West. OHA noted that under long-standing precedent, concerns are affiliated through economic dependence when one depends on the other for 70 percent or more of its revenue. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007). During the three prior years, Core Recoveries obtained 99.6 percent, 99.8 percent and 94 percent of its annual receipts from West Asset Management. OHA noted that if the firms are no longer economically dependent as of the date that the small business size certification was made, then affiliation will not be found. However, Core Recoveries was unable to show that its receipts from West had declined to below 70% of total receipts as of the certification date of November 19, 2015. OHA held there was affiliation, and Core Recoveries was therefore not small.

**Affiliation through common investments.** In *W. Harris, Gov’t Serv. Contractor, Inc.*, SBA No. SIZ-5717, March 7, 2016, OHA considered whether Harris (owned 100% by Mr. Wesley E. Harris) was affiliated with Mr. Robert Raynor, due to their common investments in a company called “TKN” and a company known as “Outpost Investments #302, Inc.” OHA pointed out that its cases indicate that common investments requires more than a single joint investment, and common investment only in the challenged firm is not enough to support a finding of affiliation based on common investments. The common investments must be substantial, either in number

of individual investments or in total value, in order to find there is an identity of interest between the investors.

OHA found identity of interest between Mr. Harris and Mr. Raynor because they had two common investments, neither of which was in the challenged firm (W. Harris). The two men together owned 100% of both Outpost and TKN, and Outpost alone generated significant revenue. The combined average annual receipts of the firms exceeded the applicable size standard, therefore, W. Harris was not small.