NHOA
Native Hawaiian Organizations Association

Member A: Comments - Red type
Member B: Comments - Blue type
Member C: Comments - Orange type
Member D: Comments - Purple type

April 20, 2015

Brenda Fernandez
U.S. Small Business Administration
Office of Government Contracting
409 Third Street, SW, 8th Floor
Washington, DC 20416

Re: Comments regarding RIN: 3245-AG24

Dear Ms. Fernandez:

The Native Hawaiian Organization Association (NHOA) is an advocacy organization whose mission is to protect, promote and advance the legislative intent of the SBA 8(a) Business Development program for Native Hawaiian Organizations. On April 6, 2015, we submitted comments in response to the proposed rule published in the Federal Register on February 5, 2015 [80 Federal Register, No. 24, RIN: 3245-AG24]. We respectfully submit additional comments from several of our members in response to the foregoing proposed rule.

1. Regarding The Proposal For A Government-Wide Mentor-Protégé Program for Small Businesses

NHOA opposes this proposed rule change. We prefer to see five separate mentor-protégé programs. Currently Small Business Mentor-Protégé Joint Ventures (SBMPJVs) are exempt from SBA approval and want to see this exemption maintained. Furthermore, we are concerned that SBA offices are already resource constrained and the level of effort to maintain a government-wide mentor-protégé program would add considerably to this burden. We would like to see dedicated Small Business Representatives (SBRs) assigned to handle 8(a) social economic based programs with other SBRs dedicated to handle small business non-social economic based programs.

Comment of **NHOA Member A**: Although we are neutral regarding this proposed rule change, we prefer to see five separate mentor-protégé programs. Currently Small Business Mentor-Protégé Joint Ventures are exempt from SBA approval and we would want to see this exemption maintained. Furthermore, we are concerned that SBA offices are already resource constrained and the level of effort to maintain a government-wide mentor-protégé program would add considerably to this burden. We would like to see dedicated Small Business Representatives (SBRs) assigned to handle 8(a) social economic based programs with other SBRs dedicated to handle small business non-social economic based programs.

2. **Regarding the Proposed Requirement For Written Documentation of Joint Ventures**

NHOA supports this proposed rule change to§ 121.103 (h) which would clarify that any Joint Venture (JV) arrangement must have some written documentation, but does not require a separate legal entity to be established.

Comment of **NHOA Member A**: We support this proposed rule change as we are already doing this.

3. **Regarding the Proposal That If a JV Exists As a Separate Legal Entity, the JV Cannot Be Populated With Individuals Intended to Perform Contracts Awarded to the JV.**

NHOA opposes this proposed rule change. We feel that the right to decide whether to populate the JV or not should be retained by the mentor and the protégé. The purpose of the Mentor-Protégé Joint Venture (MPJV) is to build the qualifications and experience of the Protégé. This is accomplished whether or not the JV is populated or not. Therefore the decision to populate or not should be based upon business considerations. In some instances, prohibiting the JV from having its own separate employees to perform contracts awarded to the JV, would cause undue and unfair hardship. For example, some contracts have specific language which suggests that the staff performing the contract must be directly employed by the JV due to the Federal Tort Claim Act (FTCA) (10 U.S.C. 1089). The FTCA provides medical malpractice insurance for staff working under a personal service agreement. In these types of contracts, if the JV is prohibited from employing staff that perform the contract, it would incur additional medical malpractice costs.

Comment of **NHOA Member A**: We support this proposed rule change as we are already doing this.

Comment of **NHOA Member C**: We are opposed to the rule change, due to the undue and unfair hardship that we would incur. Some of our Navy contracts have specific language which suggests that our staff need to be directly employed by the awarded entity (Joint Venture) due to the Federal Tort Claim Act (10 U.S.C. 1089). The FTCA provides medical malpractice insurance for staff working under a personal service agreement. If we were not allowed to employ staff to the Joint Venture, we would have to incur additional medical malpractice costs.

Comment of **NHOA Member D**: Populated JVs have positive and efficient advantages…why would we want to take it away? 8(a) companies do not build capacity by employing (and seconding) its share of JV employees. The fact of the matter is, in the Federal business, direct labor moves from contractor to contractor, so it is rarely an opportunity to "build capacity" via project employees. What 8(a) does get is a resume and corporate exposure where corporate level folks are likely to use the experience to the betterment of the 8(a). If my observation is true, then does it really matter if the JV is populated or unpopulated? The resume and experience is transferred in each case. In reality populated JVs are more difficult to construct and as a result, we don't see a lot of them. However, it is a cleaner and more productive way to manage a project; for companies like EMCOR, it's a preferred method of contracting with 8(a) companies.

4. **Regarding the Proposal to Require All JV Partnerships to Be Formed As Separate Legal Entities**

NHOA supports this proposed rule change.

Comment of **NHOA Member A**: We support this proposed rule change.

5. **Regarding the Proposal to Allow JVs for HUB Zone contracts between a HUB Zone protégé firm and its mentor.**

NHOA is neutral regarding this proposed rule change.
Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

6. **Regarding Joint Venture Certifications and Performance of Work Reports**

NHOA supports this proposed rule change. It would promote the ability of small businesses to negotiate work share arrangements to be in compliance with the regulations and build past performance, which is the intent of the joint venture program. These requirements are already in place under the 8(a) program. So expanding the requirement to other SBA socially disadvantaged programs would level the playing field.
Comment of **NHOA Member A**: We support this proposed rule change. It would promote the ability of small businesses to negotiate work share arrangements to be in compliance with the regulations and build past performance which is the intent of the joint venture program. These requirements are already in place under the 8(a) program. So expanding the requirement to other SBA socially disadvantaged programs would level the playing field.

7. **Regarding Tracking Joint Venture Awards**
   a. Regarding the proposal to require all JVs to include in their names "small business joint venture," and to require all MPJVs to include in their names "mentor-protégé small business joint venture"
      NHOA opposes this proposed rule change as we already certify in the Representations and Certifications that we are a Small Business Joint Venture (SBJV) or a Small Business Mentor-Protégé Joint Venture (SBMPJV). So this would be an unnecessary administrative requirement.
      Comment of **NHOA Member A**: We oppose this proposed rule change as we already certify in the Representations and Certifications that we are a Small Business Joint Venture or a Mentor-Protégé Small Business Joint Venture. So this would be an unnecessary administrative requirement.
   b. Regarding the proposal to require contracting officers to identify awards as going to SBJVSs or to SBMPJVs
      NHOA is neutral regarding this proposed rule change.
      Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.
   c. Regarding the proposal to require SBCs to amend their System for Award Management (SAM) entries to specify that they have formed a joint venture
      NHOA opposes this proposed rule change as we already certify in the Representations and Certifications that we are a JV. So this would be an unnecessary administrative requirement.
      Comment of **NHOA Member A**: We oppose this proposed rule change as we already certify in the Representations and Certifications that we are a Joint Venture. So this would be an unnecessary administrative requirement.
   d. Regarding the proposal to require each JV to get a separate DUNS number
      NHOA supports this proposed rule change.
      Comment of **NHOA Member A**: We support this proposed rule change.

8. Regarding the Application for SBA's Small Business Mentor-Protégé Program

Small businesses seeking a mentor-protégé (MP) relationship would be required to submit an application to SBA for approval of the MP relationship through the 8(a) BD program or through the government-wide program. SBA is considering having one office review applications for approval or declination to ensure consistency in the process. SBA seeks comments as to what approach should be implemented.

NHOA opposes proposed rule change. We are concerned that SBA offices are already resource constrained and the level of effort to maintain a government-wide MP program would add considerably to this burden. We would like to see dedicated SBRs assigned to handle 8(a) social economic based programs with other SBRs dedicated to handle small business non-social economic based programs.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change. However, we are concerned that SBA offices are already resource constrained and the level of effort to maintain a government-wide mentor-protégé program would add considerably to this burden. We would like to see dedicated Small Business Representatives (SBRs) assigned to handle 8(a) social economic based programs with other SBRs dedicated to handle small business non-social economic based programs.

9. Regarding the Proposal for SBA to Implement "Open" and "Closed" Periods For The Acceptance of Applications for the New MP Program

NHOA is vehemently opposed to this proposed rule change, as it would limit the ability of all small businesses to actively pursue work. We believe small businesses should be able to submit their MP Agreements to the SBA for review and approval at any time. Small businesses cannot predict when it would be most advantageous to seek, find, and form a MP relationship with a large business. The need to form a MP relationship is driven by the small business's need to acquire specific management or skill set in order to be more competitive. If this proposed change is implemented, NHOA can envision opportunities hitting the street and small businesses being unable to pursue them because the MP approval period is closed. Because this rule would constrain the ability of small businesses to compete, it is not aligned with the mission of SBA to promote and grow small businesses.

Comment of **NHOA Member A**: We are opposed to this proposed rule change as it would limit the ability of all small businesses to actively pursue work. If this proposed change is implemented, we can envision opportunities hitting the street and small businesses being unable to pursue them because the mentor-protégé approval period is closed. Because this rule would constrain the ability of small businesses to compete, it is not aligned with the mission of SBA to promote and grow small businesses.

Comment of **NHOA Member** B: We oppose the SBA's proposed rule that would only allow applications for new Mentor-Protégé arrangements to be submitted during "open" periods. Small Businesses cannot predict when it would be most advantageous to seek, find, and form a relationship with a large business to enter into a Mentor-Protégé relationship. The need to form a M-P relationship will be market/business driven by the Small Business to acquire a needed management or skill set to be more competitive. Having to wait for the next available "open" period, would artificially delay the need to the detriment of the Small Business.

We believe Small Businesses should be able to submit their Mentor-Protégé Agreements to the SBA for review and approval at any time.

10. **Regarding Mentors**

a. Regarding the proposal to amend 8(a) regulations to no longer allow non-profit entities to form JVs with 8(a) firms

NHOA is neutral regarding this proposed rule change.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

b. Regarding limitations on the number and types of protégés that a mentor may have. SBA will allow a mentor to have up to three protégés, but no more than three protégés at one time. A mentor can have one or more protégés in one program and one or more in another program, but no more than three in the aggregate. Further, no mentor can have protégés that are competitors.

NHOA supports this proposed rule change.

Comment of **NHOA Member A**: We support this proposed rule change.

c. Regarding the proposal that a protégé may not become a mentor to another firm and retain its protégé status.

NHOA supports this proposed rule change.

Comment of **NHOA Member A**: We support this proposed rule change.

11. **Regarding Protégés**

a. Regarding the proposal to eliminate restrictions to qualify as a protégé for the 8(a) MP program.

NHOA supports this proposed rule change.

Comment of **NHOA Member A**: We support this proposed rule change.

b. Regarding the proposal to allow any firm that qualifies as small to participate in a mentor-protégé program, or if participation should be restricted to smaller firms.

NHOA supports this proposed rule change.

Comment of **NHOA Member A**: We support this proposed rule change.

c. Regarding the request for comments as to whether there should be a maximum of two mentors per protégé, or another maximum.

NHOA opposes this proposed rule change, as there are already other requirements in place to gage the continuation of the MP agreement. So this would be an unnecessary administrative requirement. Furthermore, we oppose the limit of two mentors per protégé, as there could be a significant benefit to a small business having more than two mentors with each representing different core business lines.

Comment of **NHOA Member A**: We oppose this proposed rule change as there are already other requirements in place to gage the continuation of the mentor-protégé agreement. So this would be an unnecessary administrative requirement. Furthermore, we oppose a limit of two mentors per protégé as there could be a significant benefit to a small business having more than two mentors with each representing different core business lines.

12. **Regarding the proposal to limit the duration of a MP agreement to no more than three years.**

NHOA opposes the limitation of the MP relationship to no more than three years and would oppose any limitation on the length of the MP relationship. The learning process of each small business is different due to the specific skill set or management area, or business segment it is trying to learn. As an example, relying on the mentor to provide the management expertise for a small business to acquire an

ISO 9001 certified Quality Management System could take more than three years. Other corporate certifications, such as DCAA Approved Finance Systems, ITIL Certifications or PMP Certifications for Leaders, take time to develop. NHOA strongly recommends the SBA to not impose any time limits on MP relationships beyond the current rules tied to the life of the 8(a) firm in the 8(a) program. As long as the parties are making good faith efforts to meet the requirements of the MP agreement, the MP relationship should be allowed to continue.

Comment of **NHOA Member A**: We also oppose the limitation of the mentor-protégé relations to no more than three years and would oppose any limitation on the length of the mentor-protégé relationship. As long as the parties are making good faith efforts to meet the requirements of the mentor-protégé agreement, the mentor-protégé relationship should be allowed to continue.

Comment of **NHOA Member B**: Additionally, we oppose the SBA's proposed rule to limit M-P agreements to three (3) years. The learning process of each Small Business is different due to the specific skill set, management area, or business segment it is trying to learn. As an example, relying on the Mentor to provide the management expertise for a Small Business to acquire an ISO 9001 certified Quality Management System can take more than 3 years. Other corporate certifications such as DCAA approved finance systems, ITIL certifications or PMP certifications for leaders, takes time to develop. Rather, we strongly recommend that the SBA not impose any time limits on M-P relationships beyond the current rules tied to the life of the 8(a) firm in the 8(a) program.

13. Regarding the proposal to require firms to receive a size determination from SBA that a firm qualifies as a small business before approving that firm to act as a protégé in a SBMP relationship.

NHOA supports this proposed rule change.

Comment of **NHOA Member A**: We support this proposed rule change.

14. Regarding Mentor-Protégé Programs of Other Departments and Agencies

a. Regarding the NDAA provision that a Federal department or agency cannot carry out its own agency specific MP program for small businesses unless approved by SBA. The NDAA specifically excluded the Department of Defense's MP plan from this requirement, but included all other current MP programs of other agencies.
   NHOA is neutral regarding this proposed rule change.
   Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

b. Regarding the request for comments about whether there would be a continuing need for other SBMP programs once SBA's various programs are implemented.
   NHOA is neutral regarding this proposed rule change. This decision should be made by these other departments and agencies.
   Comment of **NHOA Member A**: We are neutral regarding this proposed rule change. This decision should be made by these other departments and agencies.

c. Regarding the request for comments about whether the subcontracting incentives authorized by MP programs of other agencies should specifically be incorporated into SBA's MP programs.
   NHOA supports this proposed rule change as it would promote and grow small businesses.
   Comment of **NHOA Member A**: We support this proposed rule change as it would promote and grow small businesses.

15. Regarding The Benefits of Mentor-Protégé Relationships

a. Regarding the proposal to allow a MPJV to qualify as small for any contract or subcontract provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement.

NHOA is neutral regarding this proposed rule change, as it is consistent with existing requirements.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change as it is consistent with existing requirements.

b. Regarding the rule that does not allow a JV to qualify for any other small business program. For example, a JV participating in the SBMP program would not qualify for a contract reserved for a specific set-aside such as 8(a), HUB Zone, or SDVOSB.

NHOA supports this proposed rule change.

Comment of **NHOA Member A**: We support this proposed rule change.

c. Regarding the proposal to allow a mentor to a small business to own an equity interest of up to 40% in the protégé firm in order to raise capital for the protégé firm and the request for comments on whether this 40% ownership interest should be a temporary interest, being authorized only as long as the mentor-protégé relationship exists, or whether it should be able to survive the termination of the mentor-protégé relationship.

NHOA opposes this proposed rule change, as this should be a decision made by the mentor and the protégé. Our concern is that this proposed rule change would have a chilling effect on the creation of mentor-protégé agreements.

Comment of **NHOA Member A**: We oppose this proposed rule change as this should be a decision made by the mentor and the protégé. Our concern is that this proposed rule change would have a chilling effect on the creation of mentor-protégé agreements.

16. Regarding Written Mentor-Protégé Agreements

a. Regarding the proposal requiring all MP agreements are in writing. The document must identify the benefits intended to be derived by the protégé firm. SBA must approve any agreement prior to the firms receiving any benefits through the MP program.

NHOA is neutral regarding this proposed rule change. It would protect the protégé to have the agreement in writing.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change. It would protect the protégé to have the agreement in writing.

b. Regarding the request for comments about whether SBA should consider limiting its review and approval of MP agreements to certain open periods each year or allow submission of agreements at any time, but limit the number of MP agreements it will review and/or approve each year.

NHOA is vehemently opposed to this proposed rule change, as it would limit the ability of all small businesses to actively pursue work. NHOA believes small businesses should be able to submit their MP Agreements to the SBA for review and approval at any time. Small businesses cannot predict when it would be most advantageous to seek, find and form a MP relationship with a large business. The need to form a MP relationship is driven by the small business's need to acquire specific management or skill set in order to be more competitive.

If this proposed change is implemented, NHOA envisions opportunities becoming available and small businesses being unable to pursue them because the MP approval period is closed or because SBA has already reached the maximum number of MP agreements it will approve that year. Because this rule would constrain the ability for small businesses to compete, it does not align with the mission of SBA to promote and grow small businesses.

Comment of **NHOA Member A**: We oppose this proposed rule change. There are no defined limitations as to the number or duration of the open periods. SBA is already resource constrained and the process for approving mentor-protégé agreements is slow. The implementation of "closed periods" would further slow this process down.

Comment of **NHOA Member B**: We oppose the SBA's proposed rule that would only allow applications for new Mentor-Protégé arrangements to be submitted during "open" periods. Small Businesses cannot predict when it would be most advantageous to seek, find, and form a relationship with a large business to enter into a Mentor-Protégé relationship. The need to form a M-P relationship will be market/business driven by the Small Business to acquire a needed management or skill set to be more competitive. Having to wait for the next available "open" period, would artificially delay the need to the detriment of the Small Business.

We believe Small Businesses should be able to submit their Mentor-Protégé Agreements to the SBA for review and approval at any time.

c. Regarding SBA reviewing agreements annually to approve continuation of the agreement for another year.

NHOA is neutral regarding this proposed rule change.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

d. Regarding the proposal to clarify existing regulations for MP agreements through the 8(a) program that if control of the mentor changes, the previously approved MP relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the MP agreement and will continue its commitment to fulfill its obligations under the agreement.

NHOA supports the SBA's proposed rule that would allow a MP relationship to continue after a mentor is acquired by another business, so long as the new mentor expresses in writing that the MP agreement will remain, and that the new mentor is committed to fulfill the obligations under the agreement. However, NHOA is concerned that the protégé should have the right to refuse to continue under the new mentor.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change. However, we are concerned that the protégé should have the right to refuse to continue under the new mentor.

Comment of **NHOA Member B**: Supports the SBA's proposed rule that would allow a M-P relationship to continue after a Mentor is acquired by another business, so long as the new Mentor expresses in writing that the M-P agreement will remain, and that the new Mentor is committed to fulfill the obligations under the agreement.

17. Regarding the proposal to clarify that interested parties may protest the size of an SBA approved 8(a) JV that is the apparent successful offeror for a competitive 8(a) contract.

NHOA opposes this proposed rule change. The 8(a) joint venture already goes through the process of being vetted by SBA and being determined to be small. So this proposed rule change would conflict with current regulations and standard operating procedures. Furthermore, it would be an unnecessary administrative requirement.

Comment of **NHOA Member A**: We oppose this proposed rule change. The 8(a) joint venture already goes through the process of being vetted by SBA and being determined to be small. So this proposed rule change would conflict with current regulations and standard operating procedures. Furthermore, it would be an unnecessary administrative requirement.

18. Regarding Establishing Social Disadvantage for the 8(a) BD Program

NHOA is neutral regarding this proposed rule change.

Comment of **NHOA Member A:** We are neutral regarding this proposed rule change.

19. Regarding Substantial Unfair Competitive Advantage within an Industry Category

NHOA supports the SBA's proposed rule that for entity-owned business concerns the definition of an unfair competitive advantage is viewed at the national level, and not the local market level.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

Comment of **NHOA Member B**: Supports the SBA's proposed rule that for entity-owned business concerns the definition of an unfair competitive advantage is viewed at the national level, and not the local market level.

20. Regarding Management of Tribally Owned 8(a) Program Participants

The proposal would specify that the individuals responsible for the management and daily operations of a tribally-owned concern couldn't manage more than two Program Participants at the same time.

NHOA vehemently opposes this proposed rule change as the same management team can effectively manage more than two Program Participants at the same time.

Comment of **NHOA Member A**: We oppose this proposed rule change as the same management team can effectively manage more than two Program Participants at the same time.

21. Regarding the Control Requirement for Native Hawaiian Organizations (NHOs)

NHOA opposes the proposed rule that would allow SBA to require individual NHO Board members to demonstrate more specific industry-related experience in appropriate circumstances to ensure that the NHO in fact controls the day-to-day operations of the firm (similar to individually owned firms). The regulations state that an NHO can appoint a non-disadvantaged individual with demonstrated technical expertise to manage the day-to-day operations of the firm and the Board members need only have the managerial experience to run the firm. SBA's Office of Certification & Eligibility in San Francisco has, in the past, taken a hard line stance that the NHO's Board Members need to have specific industry-related experience, and not merely managerial experience. NHOs have the opportunity to add several entity-owned concerns to its portfolio. Adding new companies to its portfolio carries the additional burden that each new company must be in a different business sector (Primary NAICS Code). The burden of finding or adding new NHO Board members with industry-related experience in every new business, yet share the same value system as the current board, is unwarranted, nor prudent. The continuity of the NHO relies on Board Members who have a long personal history with each other, the Native Hawaiian

community, and other Native Hawaiian businesses. Their clout lies with the Non-Profit NHO, not on the For-Profit side of the business. Adding new NHO Board members because a potentially new entity-owned business is in a new industry is not necessary. If the NHO Board has already demonstrated that it can provide management oversight over one business, it doesn't need to prove it once more over another business. The entity-owned concern will hire (either at the President, Vice President or even at the Program level) the individual who has the specific industry-related skills to make the business successful.

Comment of **NHOA Member A**: We oppose this proposed rule change because the regulations state that an NHO can appoint a non-disadvantaged individual with demonstrated technical expertise to manage the day-to-day operations of the firm and the Board members need only have the managerial experience to run the firm.

Comment of **NHOA Member B**: We oppose the SBA's proposed rule that may require NHO individual (board) members to demonstrate more specific industry-related experience in appropriate circumstances to ensure that the NHO in fact, controls the day-to-day operations of the firm (similar to individually owned firms). The SBA's Office of Certification & Eligibility in San Francisco in the past has taken a hard line stance that the NHO's Board Members needed this specific industry-related experience, and not merely managerial experience. NHOs have the opportunity to add several entity-owned concerns to its portfolio. Adding new companies to its portfolio carries the additional burden that each new company must be in a different business sector (Primary NAICS Code). The burden of finding or adding new NHO Board members with industry-related experience in every new business, yet share the same value system as the current board, is unwarranted, nor prudent. The continuity of the NHO relies on Board members who have a long personal history with each other, the Native Hawaiian community, and other Native Hawaiian businesses. Their clout lies on the Non-Profit NHO, not on the For-Profit side of the business. Adding new NHO Board members because a potentially new entity-owned business is in a new industry is not necessary. If the NHO Board has already demonstrated it can provide management oversight over one business, it doesn't need to prove it can over another business. The entity-owned concern will hire, either at the President, Vice President or even at the Program level the individual who has the specific industry-related skills to make the business successful.

22. Regarding the clarification that an NHO-owned firm's eligibility for 8(a) program participation is separate and distinct from the eligibility of individual members, directors, or managers.

NHOA supports this proposed rule change.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

23. Regarding the Determination of Economic Disadvantage for NHOs

NHOA is opposed to NHOs being treated as tribes. Instead, NHOA proposes that NHOs be deemed economically disadvantaged, as are the ANCs. If this requires a statutory change, NHOA proposes in the alternative that economic disadvantage of NHOs be based upon statistics compiled by the US Census, the State of Hawaii or the Office of Hawaiian Affairs demonstrating that Native Hawaiians are economically disadvantaged. A second alternative would be for NHOs only be required to prove economic disadvantage of a majority of its Board members at the time they certify their first 8(a) subsidiary. Thereafter, as long as the qualifying Board members remain as the majority of the Board, further qualification would be unnecessary.

Comment of **NHOA Member A**: We are opposed to NHOs being treated as tribes. Instead we support both NHOs and tribes be deemed economically disadvantaged as are the ANCs. We propose that NHOs

only be required to establish economic disadvantage of a majority of its Board members at the time they certify their first 8(a) subsidiary. Thereafter, as long as the qualifying Board members remain as the majority of the Board, further qualification would be unnecessary. We further propose that the initial threshold for determination of economic disadvantage be increased from $250,000 to $350,000 and that the threshold for economic disadvantage in subsequent years be raised from $750,000 to $1,000,000.

24. Regarding the Proposal for SBA to Have Authority to Change a Participant's Primary Industry Classification

a. Regarding the requirement that an applicant must select a NAICS code that is different from the primary business classification of any other Participant owned by that same entity.
NHOA is opposed to this proposed rule change. Unless the entity is dominant on a National level, more than one subsidiary owned by the same entity should be allowed to have the same NAICS code.
Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

b. Regarding SBAs contention that there is no current requirement that the newly admitted Participant actually perform most or any work in its NAICS code designated as its primary industry. SBA believes this could allow firms to circumvent the intent of the regulations.
NHOA vehemently disagrees and opposes this comment because the SBA approves the newly admitted Participant's Primary NAICS code based on work performed by the applicant in the previous 2 years. This work may have been outside of the Federal Government, or even if it was with the Federal Government, outside of the 8(a) program. The newly admitted Participant will have access to new clients and customers in Federal agencies because of their new classification as an 8(a). Limiting their access to new work outside of their Primary NAICS based on past history would have a significant limiting effect on the newly admitted Participant.
Comment of **NHOA Member** A: We disagree.
Comment of **NHOA Member B**: We oppose this comment because the SBA approves the newly admitted Participant's Primary NAICS code based on work performed by the applicant in the previous 2 years. This work may have been outside of the Federal Government, or even if it was with the Federal Government, outside of the 8(a) program. The newly admitted Participant will have access to new clients and customers in Federal agencies because of their new classification as an 8(a). Limiting their access to new work outside of their Primary NAICS based on past history would have a significant limiting effect on the newly admitted Participant.

c. Regarding the proposal to allow SBA to change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another. The proposed language intends that revenue from the primary NAICS must exceed revenues generated from any other NAICS code.
NHOA vehemently opposes this proposed rule change, as it would limit the ability of the small business to grow. Most small businesses do not have consistent growth and may have revenues that fluctuate year to year.
Comment of **NHOA Member A**: We oppose this proposed rule change as it would limit the ability of the small business to grow. Most small businesses do not have consistent growth and may have revenues that fluctuate year to year.

d. Regarding the proposal to provide discretion to SBA in deciding whether to change a Participant's primary industry classification because SBA can recognize whether a portion of a firm's revenues is derived from one NAICS code as opposed to one or more other NAICS codes is a snapshot in time.
NHOA vehemently opposes this proposed rule change for the same reason.
Comment of **NHOA Member A**: We oppose this proposed rule change for the same reason.

e. Regarding the proposal that would require SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate.
NHOA vehemently opposes SBA having the ability to change the primary NAICS.
Comment of **NHOA Member A**: We oppose SBA having the ability to change the primary NAICS. However, if this proposed rule change is implemented, we would support a requirement for SBA to notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to submit information explaining why such a change would be inappropriate.

f. Regarding the request for comments on whether a change in primary industry should instead by automatic based on FPDS data.
NHOA vehemently opposes this proposed rule change, as it would limit the ability of the small business to grow. Most small businesses do not have consistent growth and may have revenues that fluctuate year to year.
Comment of **NHOA Member A**: We oppose this proposed rule change as it would limit the ability of the small business to grow. Most small businesses do not have consistent growth and may have revenues that fluctuate year to year. An automatic change based on FPDS data would be worse than SBA having the discretion to make the change as the Participant would have no ability to contest the change.
Comment of **NHOA Member D**: Prior to submitting its application into the SBA 8(a) BD Program, the applicant 8(a) company has undergone a rigorous analysis of the economic environment it expects to see over the next 3-9 years, assesses its own strengths and weaknesses, examines its geographic location in terms of situated government agencies and their contracting portfolio, factors in the academic and skill labor market, and develops its business plan in such great detail that it has a built in flexibility to remain local or expand into other geographic locations.

A major decision every 8(a) makes is its primary NAICS code, a code that may have been based on its recent contract successes that provide past performance, or perhaps the financial commitment by the NHO or Tribe or ANC that allows the applicant company to select a NAICS code that can be leveraged by the NHO, or a code that allows growth because it has a maximum 3-year running average based on contract volume or number or personnel.

It is not a decision lightly made, for every aspect of the applicant's business analyses outlined in the first paragraph above touches on the eventual decision as to which primary NAICS code to select.

A significant factor in selecting a primary NAICS code is the SBA's embedded programmatic encouragement to every 8(a) applicant and company to also select alternate NAICS codes that support the applicant's business plan; SBA, a regulatory rather than a business agency, has by this programmatic dictum provided a brilliant economic gift to every 8(a) company – the ability

to grow the company through diversity and flexibility, two business values so real in government contracting.

SBA's recommendation to remove the 8(a) company from the primary NAICS code decision making process and install itself as the single decision making authority is clearly without merit; there is no reason for a change in a system that is not broken and has never been broken.

The question that we and SBA should ask is, why.

Assuming SBA overrides the views of every Tribe, ANC and NHO and replaces the 8(a) company as the primary NAICS code authority, the native groups are then faced with a stultifying compliance burden by an enormous management complexity that SBA cannot now, or in the future, solve without massive Congressional/taxpayer funding.

Rather than assist small and 8(a) businesses be successful and serve their social missions, SBA is recommending a retrenchment rather than an innovation.

8(a) companies must comply with the FAR and other regulatory mandates that are welcomed and necessary; business practices are best served by an SBA that supports rather than overburdens an 8(a) company by taking away another 8(a) business decision, a decision to select its own primary NAICS code as appropriate to its business analyses.

25. Regarding 8(a) BD Program Suspensions

NHOA opposes this proposed rule change. However, NHOA would support a suspension due to a major disaster, if SBA first obtained the Participant's consent to the suspension. The participant should have the right to decide whether or not to be suspended. NHOA would also support a suspension due to a lack of appropriations, if SBA first obtained the Participant's consent to the suspension. The participant should have the right to decide whether or not to be suspended.

Comment of **NHOA Member A**: We oppose this proposed rule change. However, we would be neutral regarding a suspension due to a major disaster, if SBA first obtained the Participant's consent to the suspension. The participant should have the right to decide whether or not to be suspended. We would also be neutral regarding a suspension due to a lack of appropriations, if SBA first obtained the Participant's consent to the suspension. The participant should have the right to decide whether or not to be suspended.

26. Regarding Benefits Reporting Requirement

NHOA opposes amending the time frame for reporting of benefits and strongly prefer to submit our benefits report during the annual review submission.

NHOA also opposes the imposition of a mandatory benefits reporting form because there are additional social and economic benefits that are not readily quantifiable. NHOA would support the optional use of a benefits reporting form if Participants have the option to attach an additional letter detailing and/or explaining their benefit activities. Designing a report form must be done with full participation of the Tribes, ANCs and NHOs. It cannot be a one size fits all approach that is imposed upon Native 8(a) companies.

Comment of **NHOA Member A**: We are opposed to amending the time frame for reporting of benefits and strongly prefer to submit our benefits report during the annual review submission.

We are neutral regarding the Discussion Draft of the 8(a) Participant Benefits Report Form distributed by SBA at the Tribal Consultation held in Washington, DC on February 26, 2015. This draft form is acceptable as long as Participants have the option to attach an additional letter detailing and/or explaining their benefit activities.

Comment of **NHOA Member D**: In addition, SBA is considering formalizing the reporting of benefits to native members and/or the native community.

Interestingly, the Regional SBA agencies that process a NHO/8(a) program eligibility and certification application now require as part of the application a detailed plan by the applicant as to how it will accomplish and achieve its support to native members or the native community.

The Regional SBA Agencies, as SBA San Francisco or SBA King of Prussia, today demand a detailed plan by the applicant as a requirement that must be fulfilled before the application can be processed. Developing the detailed plan presupposes that the decision to formalize the reporting of benefits to native members and/or the native community has been made.

However, our NHOA agrees that a formal report would be helpful rather than a burden simply because it would allow us to focus on why we have been granted several contracting privileges not shared by other 8(a) companies – serve principally Native Hawaiians in the State of Hawaii through programs that improve their lives through collaboration and participation.

Designing a report, however, must be done by full participation by every Tribe, ANC and NHO.

Today, SBA's native programs are unequal; a principle reason is the lack of parity between the Tribes/ANCs and the NHOs; the Tribes' and ANCs' authorities and privileges are embedded in Congressional treaties and agreements, codified by decades of statutory and regulatory decisions documented in the FAR and other contracting vehicles.

The NHOs lack this authority.

Hence, the ability to build substantial cash flow that can be programmed to provide sustaining supporting programs that improve the lives of indigenous peoples is built into the DNA of the Tribes and ANCs. The NHOs have not been granted the same authorities or privileges or gifts.

As a matter of fact, for example, the NHOs can only use their sole source authority within DOD and not any of the other 8 Federal Agencies, a huge impact on building an economic engine for NHOs; and given the recent Congressional laws that mandate strict statutory restrictions by all Federal Agencies on the use of sole source authority, there has been a significant drop in the use of sole source authority by the Federal Agencies. The impact within DOD has fallen heavily upon the NHOs.

Therefore, while our NHOA supports a reasonable formal report of benefits to native members and/or the native community, designing such a format cannot be one size that fits all.

To get it right, flexibility and reasonableness must govern; equally important is the NHOs must develop its own reporting format.

27. Regarding Reverse Auctions

NHOA is neutral regarding this proposed rule change.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

28. Regarding the Processing of Applications for HUB Zone Certification

NHOA is neutral regarding this proposed rule change.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

29. Regarding Reconsideration of Decisions

NHOA is neutral regarding this proposed rule change.

Comment of **NHOA Member A**: We are neutral regarding this proposed rule change.

30. Regarding Administrative Record in 8(a) Appeals

NHOA is opposed to this proposed rule change. We do not want a review of the record and prefer instead to have a new trial on the facts.

Comment of **NHOA Member A**: We are opposed to this proposed rule change. We do not want a review of the record and prefer instead to have a trial de novo on the facts.

31. Another Issue of Concern Regarding the Ability of NHOs to Have Sole Source Contracting Opportunities with All Federal Agencies.

While looking at the proposed rule changes published on February 5, 2015, NHOA also noticed that another issue of concern should be brought to the attention of SBA. Alaska Native Corporations (ANCs) and the Tribal-Owned Native 8(a) firms have the right to sole source contracts of unlimited dollar amounts with all federal agencies whereas NHOs sole source contracting is limited to Department of Defense contracts. The reason for this limitation is that the NHO program was passed under the Defense Authorization Act, limiting the sole-source capability to Department of Defense contracts whereas ANC and tribal-owned 8(a) firms are derived from their sovereign relationship with the U.S. government. NHOA supports the ability of NHOs to have sole source contracting opportunities with all federal agencies.

Thank you for your time and consideration of NHOA's comments.

Respectfully,

Ron Jarrett
President
Native Hawaiian Organizations Association

cc: U.S. Senator Brian Schatz
U.S. Senator Mazie Hirono
U.S. Representative Tulsi Gabbard
U.S. Representative Mark Takai
John Klein, Associate General Counsel for Procurement Law, SBA
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Chris James, Assistant Administrator, Office of Native American Affairs, SBA
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