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## Venable Victory Clarifies Size Determination Law

On December 7, 2011, the United States Small Business Administration Office of Hearings and Appeals (the "OHA") overturned an Area Office size determination concluding that GPA Technologies, Inc. ("GPA") was other than small, and, in doing so, revisited the legal landscape regarding a familial presumption of affiliation between two business concerns, and what is required to establish a clear line of fracture between them. The Area Office had concluded that GPA, a small business, was affiliated with Santa Barbara Applied Research, Inc. ("SBAR") because GPA's owner was the brother of SBAR's owner. This created a presumption of affiliation between the companies that, according to the Area Office, GPA had not rebutted.

Venable argued that the Area Office's decision inaccurately characterized GPA's and SBAR's business relationship in that GPA and SBAR operated from different facilities, conducted business in different industries, and contracted with different client-bases. Venable stressed that the companies' shared subcontracts represented a small percentage of each company's overall revenue, as well as their insignificant number of shared non-managerial employees. In this way, Venable argued that GPA had created a clear line of fracture between the companies and rebutted the presumption of affiliation with SBAR because GPA had removed all incentives to act in concert with SBAR, which is the reason behind the familial presumption of affiliation. GPA did not control SBAR and SBAR did not control GPA.

The OHA agreed. The OHA determined that GPA was not affiliated with SBAR for all of the factual reasons that Venable had articulated. GPA and SBAR had kept their interests separate. The OHA went on to clarify that a previous OHA decision "was in error in holding that there must be no economic or business relationship whatever between family members or their firms to establish a clear line of fracture. Instead, consistent with other OHA case law, [the OHA found that] a minimal amount of economic or business activity between two concerns does not prevent a finding of clear fracture. As Appellant argues, a small amount of economic activity is not sufficient to create a commonality of interests to make the firms act in concert or as one." The OHA reiterated that "the key concept of affiliation is whether one firm controls or has the power to control the other."

The determination of whether two companies are affiliated under SBA regulations is highly fact-specific, and for small disadvantaged businesses, the determination may vary depending upon the category of preference claimed. If you have questions about whether your company might be affiliated with another entity under SBA regulations, you may wish to consult with legal counsel.

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