



August 22, 2019

VIA ELECTRONIC SUBMISSION

Khem R. Sharma, Ph.D.
Chief, Office of Size Standards
U.S. Small Business Administration
409 Third Street, SW
Mail Code 6530
Washington, DC 20416

Re: Small Business Size Standards: Calculation of Annual Average Receipts (84 Federal Register 29399 (June 24, 2019), RIN 3245-AH16

Dear Dr. Sharma:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the U.S. Small Business Administration's proposed rule, Small Business Size Standards: Calculation of Annual Average Receipts. Advocacy urges the Small Business Administration (SBA) to revisit, revise, and re-publish for comment a supplemental Initial Regulatory Flexibility Analysis (IRFA) to ensure proper alternatives are discussed.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

¹ 5 U.S.C. §601 et seq.

² Pub. L. No. 104-121, Title II, 110 Stat. 847, 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).



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The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.³ The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

Background

In accordance with Public Law 115-324, this rule proposes to modify SBA's method for calculating annual size standards for service-industry firms from one based on an average of gross receipts over a period of three years to an average of gross receipts over a period of five years.

Advocacy is concerned that the Initial Regulatory Flexibility Analysis lacks required elements that would provide small businesses with an adequate amount information to determine the impact of the rule.

Section 603(a) of the RFA requires agencies to assess the impact of any proposed rule on small entities, including small businesses, small nonprofit organizations, and small jurisdictions with populations of less than 50,000. Section 603(b) sets out the required elements of an initial regulatory flexibility analysis; these include (1) a description and the number of the small entities to be regulated by the rule; (2) a description of the projected costs of the rule; and (3) an identification of "all Federal rules which may duplicate, overlap, or conflict with the proposed rule."

In its IRFA for the proposed rule, SBA argues that "the objective of this proposed rule is to change SBA regulations on the calculation of business size in terms of annual average receipts to implement Public Law 115-324 and there are no other alternatives to achieve that objective."⁵ There are, however, some alternative methods of implementing the change in size standard calculation that may provide additional certainty and flexibility for businesses most likely to be directly affected by the change.

Contrary to SBA's position, there are alternatives to this rule the agency could consider that would not conflict with the statutory requirement of Public Law 115-324. Advocacy does not believe that the legislative intent of this law was to harm some small businesses to the benefit of other small businesses but to provide greater protection to all small businesses that may be harmed by the unintended consequences of a size standard calculation methodology that does not fully take into consideration the current economic environment in which small businesses compete.

As laid out in the economic analysis in the proposed rule, the adjustment of the revenue size standard averaging period will have different effects for different groups of small businesses. Businesses near the size threshold that are growing in revenue will benefit from the change because they will be considered small for longer than they otherwise would have been. For these

³ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 124 Stat.2504, 2551.

⁴ *Id.*

⁵ 84 Federal Register at 29412.

firms, the change will mean both increased access to financing through SBA's programs and increased access to preferential treatment in the government contracting process. Contrariwise, firms near the revenue threshold that are declining in revenue will be considered other-than-small for longer than they otherwise would have been. These firms will face costs from the rule in the form of decreased access to financing and preferential treatment in government contracting. Finally, small businesses not near the threshold will bear costs in the form of increased competition for SBA program participation and for government contracts.

SBA estimates that 3,260 currently large firms will gain small status under the proposed rule and 3,801 currently small firms will have their small status for a longer period of time. On the other hand, SBA estimates that 2,855 small firms will lose their small status under the proposed rule, while 347 small firms will have their small status for a shorter period of time. It is among these latter two groups that the most immediate losses are expected to occur.

Alternatives to the rule as proposed exist, and SBA should consider them to minimize the economic impact of the rule.

The following proposed alternatives are not an exhaustive list of all available alternatives but they do represent some of the comments that the Advocacy has received from small businesses.

1. One alternative that could provide flexibility for businesses whose status would be lost or cut short under the proposed rule is to allow for a one- or two-year phase in period during which a business could be certified as small under either the 3-year or 5-year averaging period. Under this alternative, the benefits of the change could be realized immediately while the direct costs could be deferred, allowing businesses to readjust their business strategy to the change.
2. A second, nonexclusive alternative would be to allow small businesses that have already been awarded a government contract to be recertified using either the current or the proposed standard for the purposes of that contract through the length of that contract and any options.

Conclusion

P.L. 115-324 requires that SBA establish a small business size standard for businesses in the services industries "on the basis of the annual average gross receipts ... over a period of not less than five years."⁶ However, the regulation implementing this law must also provide these businesses with a strong foundation for a level playing field and a level of certainty for them to design a profitable business model. The proposed IRFA should be revised to address the areas of concern by considering alternatives such as those outlined above and by allowing the public to comment on those alternatives.

⁶ 15 U.S.C. Sec. 632(a)(2)(C)(ii)(II).

Thank you for the opportunity to comment on this important issue for small businesses. If you have any question regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact me at (202) 205-7150.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel for Advocacy

Copy to: Paul Ray, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget