

**CLEARED FOR TAKE-OFF? IMPLEMENTATION OF  
THE SMALL BUSINESS RUNWAY EXTENSION ACT**

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**HEARING**

BEFORE THE

**COMMITTEE ON SMALL BUSINESS**

**UNITED STATES**

**HOUSE OF REPRESENTATIVES**

**ONE HUNDRED SIXTEENTH CONGRESS**

**FIRST SESSION**

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## **CLEARED FOR TAKE-OFF? IMPLEMENTATION OF THE SMALL BUSINESS RUNWAY EXTEN- SION ACT**

**TUESDAY, MARCH 26, 2019**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON SMALL BUSINESS,  
SUBCOMMITTEE ON CONTRACTING AND INFRASTRUCTURE,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 10:05 a.m., in Room 2360, Rayburn House Office Building. Hon. Jared Golden [chairman of the Subcommittee] presiding.

Present: Representatives Golden, Balderson, Hagedorn, and Stauber.

Chairman GOLDEN. Good morning. The Committee will come to order.

I want to thank everyone for joining us this morning, and I especially want to thank the witnesses for being here today. I also wanted to take an opportunity to thank my Ranking Member, Representative Stauber. I am glad to be getting to know you and I look forward to working together to create bipartisan solutions to help small businesses all across the country, from Belfast, Maine, and hopefully I get this right, to Brainerd, Minnesota.

Mr. STAUBER. Brainerd, you did.

Chairman GOLDEN. All right. There we go.

America's small businesses are economic engines that drive growth and jobs in the U.S. economy. The nearly 30 million small firms in the U.S. represent 99.7 percent of all employers and generate two-thirds of all new jobs. Back home in the state of Maine where I come from this is very much the case. What is very interesting is how many of our small businesses are truly very small. We are talking 10 employees or less that make up the great majority.

Firms like this play such a crucial role in our economy, and it is critical that Congress enact policies that promote small business entrepreneurship, job creation, and also provide opportunities for growth. In fact, Congress has created tax preferences and loan programs to help small businesses thrive, and as one of the largest purchasers of goods and services in the world, the Federal Government is in a unique position to support small businesses by providing contracting opportunities to help small businesses succeed.

When we establish policies aimed at helping small businesses, one of the decisions that Congress has to make is how to define a small business. I think very much the subject of this hearing as

you all know, how we define that business will determine who is eligible for contracting opportunities and other incentives designed to help small businesses compete. Getting that target right is important as I can be too narrow, pushing a firm outside the size standard, or it can be too broad, allowing a large firm to compete in these programs and overpower the small business. The end result is the same—small firms deprived of Federal contracting opportunities.

Last year, this Committee, and Congress as a whole, addressed this very issue by passing the Small Business Runway Extension Act, which requires SBA to use the gross receipts of a small business over 5 years as opposed to 3 years when considering granting Federal contracts. This change was designed to assist small businesses successfully bridge the gap between competing in the small business space and the open marketplace against larger companies. The Small Business Runway Extension Act is a move in the right direction to ensure that small businesses can mature, become prosperous, and create additional jobs that spur economic growth without having one or two particularly good years or contracts bump that firm out of the small business category before it is ready to compete with larger firms.

Unfortunately, since the Runway Extension Act became law last year, its interpretation and implementation has been contested. Shortly after the bill was passed, questions arose as to whether the bill was to take immediate effect. Businesses benefitting from the 5-year change hoped, and I believe anticipated that the change would take effect immediately so they may continue to certify as a small business in 2019. Surprisingly, the SBA has suggested that the Runway Extension Act applies to every other agency adopting its own size standard but not to the SBA itself.

While the merit of that argument is debated by legal experts, the SBA is working on regulations to implement the law, and we are doing our own analysis by holding today's hearing. It is my intent that this hearing ensure that congressional intent is not thwarted and small businesses have the Federal contracting opportunities that Congress decided and determined last year that they deserve.

I look forward to hearing from our witnesses and exploring the controversies surrounding the implementation of the act, discussing potential solutions to mitigate these challenges, and examine additional steps, if any, that may be necessary to ensure that this Committee and Congress's intent is fully implemented and in a timely manner.

I thank all the witnesses for their attendance and insights into this important topic. I would now like to yield to the Ranking Member, Mr. Stauber, for an opening statement.

Mr. STAUBER. Thank you, Mr. Chair. And I, too, look forward to working with you, and I appreciate this opportunity.

The Small Business Runway Extension Act, led by the former Chairman of this Subcommittee, was intended to be uncomplicated and straightforward. In fact, it changes only one word in the Small Business Act. Unfortunately, as simple as that was, the actual implementation of the law has been equally difficult.

The purpose of the Runway Act was to allow graduating small businesses more time to build their competitive edge when com-

peting against titans of industry in the open market. Recognizing the significance of this bill for small businesses, the Runway Act easily passed through both the House and Senate, becoming law on December 17, 2018. Quickly following the law's passage, the Small Business Association put the brakes on its implementation. The SBA sent an information notice to all Federal agencies halting the switch to the 5-year rule as mandated by the Runway Act. The SBA decided they would keep in place the previous 3-year calculation currently in regulation until the agency could undertake an assessment of the law through the rulemaking process.

Unfortunately for small businesses fluctuating between small and "other than small," this conflict in the law versus regulation poses significant, real-world challenges in the form of potential size protests and uncertainty facing small businesses and their recertifications. Advocate for the immediate implementation of the Runway Act criticized the SBA's reasoning on what they view as a straightforward and helpful piece of legislation.

However, businesses facing declining revenues applaud the SBA's cautious and transparent approach. Who is or is not considered small is up for debate, and understanding how to best achieve clarity in the law may help alleviate this uncertainty.

Regardless of who prevails in the legal arguments surrounding this debate, it is important that this Committee take a practical, policy-oriented approach to this issue and identify how best to respond to the concerns of our small businesses.

At the end of the day, our primary responsibility is to small businesses, and we must take the greatest care to uphold and protect their ability to compete and succeed.

I hope through our testimony and our witnesses today that we can come to a greater understanding of the problem and discover ways to quickly resolve the issue in a manner that will provide clarity and consistency for small businesses.

Thank you, Mr. Chair, and I yield back.

Chairman GOLDEN. Thank you, Mr. Stauber. The gentleman yields back.

And if Committee members have an opening statement prepared, we would ask that they be submitted for the record.

I will take just a few minutes to explain the timing rules. Each witness will get 5 minutes to testify, and each member gets 5 minutes for questioning. There is a lighting system to assist you. I do not know if you have done this before so I will go ahead and lay it out for you. The green light will be on when you begin. The yellow light will come on when you have 1 minute remaining. The red light will come on when you are out of time, and we ask that you stay within that timeframe to the best of your ability. It goes by quick.

I would now like to introduce our witnesses. Our first witness is Mr. David S. Black. David Black is a partner with the law firm Holland and Knight, LLP, in Tysons, Virginia, and Co-Chair of Holland and Knight National Government Contracts Group. Mr. Black's practice involves serving as a trusted advisor, problem solver, and advocate for Federal contractors, awardees, and subcontractors in every stage of growth. He provides legal advice and representation to help his clients secure opportunities, enhance per-

formance, mitigate risk, and respond to threats. Mr. Black serves contractors and awardees in a broad array of industries with an emphasis on innovative technology, cutting edge products, professional services, health care, and research and development. Welcome, Mr. Black.

Our second witness is Ms. Megan C. Connor. Megan Connor is a partner with the law firm—I am going to get this wrong. Perhaps you want to just go ahead and tell us what it is.

Ms. CONNOR. PilieroMazza.

Chairman GOLDEN. PilieroMazza, PLLC, in Washington, D.C. In that role, she counsels companies on a variety of government contracting and business matters. For small businesses in particular she assists contractors with regulatory compliance, like affiliation issues, limitations on subcontracting, and how to maintain size and status. Ms. Connor also represents contractors in state and Federal court concerning government contracts, business and employment matters. Ms. Connor received her Bachelor of Science degree Magna Cum Laude from Boston University, and received her law degree Magna Cum Laude from the University of Miami, School of Law. Welcome, Ms. Connor.

Our third witness today is Mr. Brian Morales. Brian began his career in the electrical industry at the age of 21 after finishing his education at San Diego Christian College. After obtaining his contracting license in 2008, Brian began working as a regional manager for an energy efficiency company based out of Connecticut and has managed large public projects in Alaska, Hawaii, Washington, Arizona, California, and Colorado. Today, Brian is the proud owner of ProCal Lighting, a minority-owned small business with a focus on providing equal opportunity to all genders, races, and education levels. Because of this approach, ProCal Lighting employs amazing individuals who represent the best California has to offer. Welcome Mr. Morales. Thank you.

I would now like to yield to our Ranking Member to introduce our final witness.

Mr. STAUBER. Thank you, Mr. Chair.

Our final witness today is Ms. Erin Allen. Ms. Allen is the president of Contemporaries, Inc., a small business owner operating locally in Silver Spring, Maryland, and is testifying today in her capacity as Vice Chair of the Small Business Committee of the Montgomery County Chamber of Commerce. In her role as president of Contemporaries, Inc., Ms. Allen provides extraordinary staffing services to clients in the D.C. metropolitan area, receiving outstanding recognizing from satisfied government clients such as the National Institutes of Health. In her role as part of the Executive Committee of the Montgomery County Chamber of Commerce Board of Directors, she has been instrumental in identifying legislative and regulatory issues impacting small businesses and advocating for policies that benefit the small business community. Welcome, Ms. Allen.

Chairman GOLDEN. All right. Thank you very much.

Mr. Black, you are recognized for 5 minutes.

**STATEMENTS OF DAVID BLACK, PARTNER, HOLLAND & KNIGHT; MEGAN C. CONNOR, PARTNER, PILIEROMAZZA PLLC; BRIAN MORALES, PRESIDENT, PROCAL; ERIN ALLEN, PRESIDENT, CONTEMPORARIES, INC.**

**STATEMENT OF DAVID BLACK**

Mr. BLACK. Good morning. First, I want to say thank you, Chairman Golden, thank you Ranking Member Stauber for the invitation. It is an honor and privilege to be here today to try to assist the Subcommittee look at the implementation of the Runway Extension Act.

Points I would like to make today are, first, Congress did a really good thing back in December. The current status is that it changed the 5-year standard. That is a law that went into effect. I have a little bit more on that in a moment. And small businesses have been relying on that change in the law. For the past 3 months, small businesses that would be large under the 3-year standard but are small under the 5-year standard have been submitting proposals for set-aside contracts, and they put a representation in their proposal stating that based on the change in the law, we are an eligible small business under the 5-year standard. And contracting officers are within their discretion to recognize that. And so it has been a good thing. And I think when the Subcommittee looks at the status quo, it needs to realize this is something that has been completed. It is done. It is in the books. And you know, from my perspective as a mid-tier contractor lawyer, the community has been relying on that. And so to delay effectiveness or push that back at this point would be to take something away from the mid-tier small business contracting community that Congress has already provided. And so it is a good thing and it should stay in effect.

So what has been happening is basically, SBA has been kicking up some sand and dust. And they have sort of put forth two arguments that have pretty easy solutions in the existing law. First, in the information notice that you alluded to they say, well, you read the Runway Extension Act and there was no effective date. So that means it is not effective until we issue our regulations. Well, the Supreme Court has an answer to that, and this is sort of basic principles of statutory construction. That when Congress passes the law, the omission—this is a quote from *Johnson v. United States*, a 2000 case. You should feel comfortable about what you did in December because the omission of an express effective date simply indicates that absent clear congressional direction, it takes effect on its enactment date. And everybody knows this. And so the small business contracting community has relied on the absence of an effective date. There is no clear direction that Congress intended to delay it. Quite the contrary. And so, you know, this ship has sailed. And SBA is just legally erroneous when they claim that it did not take immediate effect.

And so the other thing they say is that Section 3 of the Small Business Act, and that is where Congress has put these size regulations, the provision that sets forth the parameters for size standards, that is where the 3- and 5-year standards are, were and are, that somehow that does not apply to SBA. And I think everyone

was surprised to hear this position. I mean, when you read the statute, that subsection says that no department or agency may prescribe a regulation that conflicts with that. And there is a definition of Federal agency in the statute that clearly includes SBA. And so the only carve out from this is unless specifically authorized by statute. So Congress said, well, we might for another agency specifically authorize by statute. There is a subsection SBA points to. There is nothing in there that specifically says you are exempt from the size standard requirements that are in subsection (a)(2)(C).

So, again, the solutions are clarifying amendments at most. Congress has done a good thing. It is not to push the deadline back. You do not want to take something away that is benefitting the community and push it back. Keep it in effect. You do not really need to clarify the effective date but you could. December 17, 2018. And then the other thing is to clarify that the subsection C, (a)(2)(C), when you talk about Federal agency, you could just put a little carrot there and say “including the administrator of SBA.” And these are clarifying amendments that are not changing the law, so they apply retroactively. You would just be clarifying what Congress has meant for decades, that SBA does not have this license to come up with its own size standards. And it maintains Congress’s hook. You all want to set the policy in this area. You set it by applying it to every Federal agency in that subsection and you want to maintain that mechanism.

So with that, again, thank you for the opportunity, and I look forward to answering the Subcommittee’s questions.

Chairman GOLDEN. Thank you, Mr. Black. Ten seconds to spare.

Ms. Connor, you are next. Thank you.

#### **STATEMENT OF MEGAN C. CONNOR**

Ms. CONNOR. Good morning. Good morning, Chair Golden, Ranking Member Stauber, and distinguished members of the Subcommittee. My name is Megan Connor, and I am a partner at PilieroMazza, a law firm serving government contractors for over 30 years. We represent companies of all sizes in a variety of industries, and our firm supports the Runway Extension Act, and specifically changing how small businesses calculate their receipts from a 3-year basis to a 5-year basis.

However, we believe in implementing this change there are three issues that need to be addressed in order to avoid negative impacts on small businesses. First, small businesses deserve clarity as to the effective date of the change from 3 years to 5 years. Second, we strongly recommend a transition period during which firms may adjust to the new 5-year calculation. Third, the System for Award Management database must be updated to account for this change. I will address each of these issues in turn.

First, there is widespread confusion in industry as to the effective date of the Runway Extension Act. Although it was signed into law on December 17, 2018, as Mr. Black stated, the SBA has taken the position that it is not presently effective. While we would normally advise clients that Federal law supersedes SBA’s regulations, SBA’s regulations still state that 3 years is the basis of calculation

and the information notice that SBA published has left contractors in a state of confusion.

To illustrate the confusion this is creating, a client of ours submitted a proposal in October 2018, when the company was small under a 3-year calculation. As of January 1, 2019, that company is no longer small under a 3-year calculation but is small under a 5-year calculation. It recently had to update its representations and certifications for that same proposal. The company reiterated that it was small at the time of its initial proposal with price, which is the relevant date for size purposes, and also stated that it remains a small business pursuant to the Runway Extension Act.

This company, and others like it, should be able to take advantage of the Runway Extension Act now. Accordingly, we recommend that Congress make clear its intent as to the effective date of the Runway Extension Act. It is my understanding that the Committee is currently drafting legislation to address this. We appreciate the Committee's efforts and urge the Committee to ensure that firms that are benefitted by the act may take advantage of it as of the date it became law.

The second issue the Committee should address in implementing the Runway Extension Act is a transition period, which would allow firms that are small under a 3-year calculation, but not small under a 5-year calculation, to adjust to this change. The reality is that the Runway Extension Act unintentionally may harm small businesses that are experiencing financial downturns. For example, if a contractor unexpectedly loses a valuable follow-on contract or graduates from the SBA's 8(a) program and is no longer eligible for 8(a) contracts; in both scenarios the contractor often experiences a decrease in revenues after years of increases.

Fluctuations also could be driven by the types of contracts a contractor has. For instance, if the company is a contract holder on a large contract vehicle and has won large dollar but short-term task orders in some of the recent fiscal years but not every year, then it could experience these types of swings. Small businesses should be given the option to choose which calculation is most favorable for them, 3 years versus 5 years, for a short transition period. In this way, firms that are no longer considered small under a 5-year calculation will have time to prepare to compete as a so-called mid-size firm in the unrestricted marketplace.

Lastly, in implementing the Runway Extension Act, the System for Award Management database (SAM) should be updated to account for the change from 3 years to 5 years. When completing SAM registration, contractors must insert one amount representing their 3-year average receipts. To conform to the Runway Extension Act, SAM should be updated to request a 5-year average receipts calculation.

In conclusion, the Runway Extension Act is a positive change for government contractors, but in implementing it, any potential negative impacts should be mitigated through clarity for industry, a transition period for firms that are not benefitted by the change, and an update to SAM.

On behalf of PilieroMazza and the government contractors we represent, I would like to commend the Committee for continuing to consider how best to implement the Runway Extension Act, and

I would like to thank the Committee again for the opportunity to appear before you today. I look forward to your questions.

Chairman GOLDEN. Thank you, Ms. Connor.  
Mr. Morales?

#### **STATEMENT OF BRIAN MORALES**

Mr. MORALES. Thank you, Chairman Golden, Ranking Member Stauber, and members of the Subcommittee, for inviting me to testify today.

On behalf of the National Electrical Contractors Association (NECA) and ProCal Lighting, I greatly appreciate the opportunity to submit a statement for the record. The Subcommittee is to be commended for holding this hearing to better implement and enact a prudent bipartisan reform signed into law in the previous Congress.

My name is Brian Morales. I am the president and CEO of ProCal Lighting, which is located in Vista, California. As a second generation Mexican American and a participant of the NECA IBEW program, I founded my company in 2014 with my father, Anthony Morales, a Purple Heart recipient and a Vietnam War veteran. Since that day, ProCal Lighting has provided energy-efficient design and installations to public schools, government buildings, and some of our Nation's largest private industries. We at ProCal Lighting are proud members of the National Electrical Contractors Association, which serves as the voice of the 4,000 electrical contractors who make up the \$171 billion electrical construction industry that brings power, light, and communication technology to buildings and communities across the U.S.

Risk is inherent with any business venture, and a successful entrepreneur knows how to navigate this risk. In order to build a sustainable business and avoid undue risk, a business owner needs to be informed. For my company to continue to grow, our estimating team needs to consider the competition's approach and determine what level of risk exposure we have through formal requests for information and by receiving clear deliverables. The small business classification has allowed, and continues to allow ProCal Lighting and many other NECA contractors the opportunity to understand this risk, learn from it, and be better suited to grow.

On a personal note concerning ProCal Lighting, the small business classification has opened numerous opportunities for us to sit at the table of government procurement and competitively offer our services. Thanks to our small business classification, we, as a company, have seen benefits including access to various workshops, increase relationships with vendors and industry resources like Federal small business loans, and complementary SBA training. These resources have aided our company in competitively securing government subcontracts, working on energy efficiency projects such as the Marine Corps Recruit Depot in San Diego, as well as the Customs and Border Patrol facilities in San Diego and Orange Counties.

We at NECA and ProCal Lighting were pleased to learn about the bipartisan legislation from last Congress, the H.R. 6330, which extended the small business calculation for average receipts from 3 to 5 years. This legislation is of particular benefit to companies

like my own, who can say over a 5-year period given the measure of our current anticipated revenues for this year and the following, ProCal Lighting would still hold its certification as a small business. If the same were to be evaluated over a 3-year period, we would lose our certification after year 2020. If we were to engage in discovering projects with the Federal Government, by the time the projects were funded and released for 8(a) certified contractors, we would be disqualified from participating and lose all that investment in developing and promoting this work. The new 5-year period, when combined with a finite phase-in period benefits companies like mine by providing a measure of flexibility in determining our small business status. It also allows ProCal Lighting the ability to hold its small business certification for a longer period of time.

This phase-in period would allow both contractors and the SBA time to properly account for the 5-year calculation, while preparing businesses for the full implementation of the rule. Upon enactment of the previous Congress's legislation, ProCal Lighting can begin to acquire new clients on long-term contracts, having them become long lasting revenue sources and subsequently move our company into a safer financial position.

With nearly 80 percent of NECA's contractor members classified as small businesses, legislation allowing our contractors to fully benefit from a small business classification is of utmost importance. As a small business contractor, I am extremely encouraged by this Committee's efforts to revise and strengthen the Small Business Runway Extension Act. The further clarification and guidance of this legislation will be a key component for small business owners like myself and the 3,200 NECA small business contractors in mitigating the inherent risk of competing in our industry.

Thank you again for the opportunity to testify. Both ProCal Lighting and NECA applaud the Committee's unwavering efforts to reexamine the benefits of government programs for small businesses, and I look forward to answering any questions you may have.

Chairman GOLDEN. Thank you, sir.  
Ms. Allen?

#### **STATEMENT OF ERIN ALLEN**

Ms. ALLEN. Good morning. Thank you, Chair Golden and Ranking Member Stauber. I want to thank you for the opportunity to testify on this very important topic.

My name is Erin Allen. I am the president of Contemporaries, and I am testifying today on behalf of the Montgomery County Chamber of Commerce out of the state of Maryland.

I am here for two reasons. First, to thank you so much for the Committee to work with us to pass the Small Business Runway Extension Act last year. And also, to press for expedited implementation on this important law which affects millions of businesses all over the country just like mine.

As government contracts become larger and small business grow, it is inevitable that they will face very tough choices, the first being to grow beyond the small business programs to compete with large companies. The second is to stay small to avoid the difficulties of competing in the full and open market. Another option is to sell,

and unfortunately, the last and rather tragic option is to go out of business. As a result, there are only 1,700 mid-size businesses doing Federal work today. These firms compete not only with very large businesses, but also with small businesses who receive set-aside Federal work.

Before I go any further I want to tell you a little bit about my company and our story and why it is important to me. Excuse me. Allergies are crazy.

I am a second generation business owner. My parents started the company back in 1991. When I was tapped as president back then, we had just \$4 million in sales. Fifteen years later, we are one of the largest providers of staffing services to the NIH and as a result of that steady growth, we find ourselves at the top of our size standard, which is revenue based. Our size standard is \$7.5 million, which is microscopic in comparison to the very large businesses in our industry. My concern comes from having the time to accommodate future growth in a steady manner. The last few years have been really good for us, but the downside of that is that we risk losing that momentum should I continue that growth or be awarded a large contract. If the Runway Extension Act goes into effect, I will have a few more critical years to build my infrastructure, develop talent, and comply with some costly new cybersecurity requirements. In the end, my goal is to grow the company, to create new jobs, and to contribute to the economy.

Last year, a fellow chamber member, Steve Ramaley, recommended changing the formula for small business eligibility to the lowest of 3 of 5 years to this Committee. Ultimately, the legislation simply changed the current 3-year revenue average to 5 years for the purposes of determining size. The rationale behind this proposed change can be stated simply—competitiveness takes time to build. Revenue is not an indicator of present competitiveness. It is an indicator of future competitiveness. Having a good year or even a couple of good years does not mean that a company will continue to grow. Moving from the current 3-year lookback to a 5-year lookback would give firms more time to adjust to the full and open market.

Not just bigger small companies and midsize companies benefit from the Runway Extension Act. Any small business that intends to grow will eventually benefit from these changes. Further, having more well-qualified firms under the revenue standards will increase the chance that solicitations will be set aside and therefore, will give all firms more opportunities to compete. Large businesses will also benefit because it increases the pool of well-qualified subcontractors.

The Runway Extension Act as passed by the last Congress addresses these issues. We expected the change to be effective immediately. However, since its passage into law, the SBA has posed the argument that the size determination changes would not take effect immediately as the agency should first be able to utilize the rulemaking process and seek public comment. This decision by the SBA puts businesses in limbo.

According to the Administrative Procedures Act, an agency can issue a final rule without publishing a proposed rule. And I quote, "Congress has already directed a specific regulatory outcome into

law.” We believe that there is no question as to the intent of Congress. There was a hearing. There was a mark-up. There was a clear congressional record, and specific statutory language leaving no discretion with respect to the regulatory outcome.

While it seems unnecessary for Congress to reiterate its intent through this new legislation, we support any effort to insist on implementation. The damage caused by the delay is impacting small businesses all over the country, not just inside the beltway. The longer implementation takes, the more uncertainty and confusion there is for all small business owners. On behalf of small business owners everywhere, I implore you to press for implementation of the Runway Extension Act.

Thank you for the opportunity to testify today.

Chairman GOLDEN. Thank you very much, Ms. Allen.

I appreciate all the testimony that you have all just shared with us, and I will begin now by recognizing myself for 5 minutes of questions.

One of the recommendations that we just heard to deal with the delay and the implementation of the Runway Extension Act is for Congress to pass legislation providing for an interim period in which the 3-year and 5-year formula would apply, leaving to contractors to decide which one to use. And this interim period would sunset on the date when the Runway Extension Act became effective or when the SBA issues their rules, whichever happens first. I believe, Ms. Connor, this is an approach that you have advocated for, and I see you are reaching for your button. But I think in the interest of having more opportunity for all of you to kind of talk about your different proposed solutions, I also want to lay out an alternative to deal with the delay would be to pass a legislative amendment, something that Mr. Black talked about.

So in the interest of furthering the discussion for everyone, I might ask Mr. Black what you think the advantages and/or disadvantages of the proposed interim rule may be.

Mr. BLACK. Sure. Well, you know, I think it is not a bad thing to help what we call backsliding businesses, businesses that have emerged from small and may be struggling to compete and are experiencing a reduction in revenues.

At the same time, I think if Congress wants to help that part of the community, it needs to keep what it has done in place. It needs to maintain that continuity for the growing small businesses who are relying on this law that went into effect on December 17th. And so there is a way to do that where you clarify that the 5-year amendment went into effect on December 17th but then we are doing a new amendment to add back at the 3-year standard for a period of time. And these are all sort of judgment calls.

So, you know, anecdotally in my practice I think you are helping more small businesses who are the growers. I do not have hard data. Just I have my experience in my day to day. And my experience says, this law is benefitting—there are more businesses who are large under the 3 but small under the 5, and then there is a subset of the community. I just think it is smaller. And so this is one of those where Congress wants to think about are we letting the tail wag the dog? If we do want to help the backsliders, let us

do it in a way that makes sure we keep the help in place that we have given to the growing small businesses.

Chairman GOLDEN. Thank you, Mr. Black.

Ms. Connor, I thought I would ask you a similar question. If you could put a different cap on maybe and think a little bit about the proposed solution that Mr. Black has. What are some of the flaws with that approach or any potential benefits from your perspective?

Ms. CONNOR. Well, the benefit is that, obviously, SBA is not implementing this change, and so the major benefit would be that they would have no choice. I think it is unfortunate that it has come to that because that subsection of the act, when you read it, it is clear that it applies to SBA because it speaks to a Federal agency issuing size standards. And to my knowledge, there is no other Federal agency that issues size standards besides the SBA. And it speaks to the SBA's rulemaking process for doing so. So it is unfortunate that the Committee and Congress are put into that position by another branch of government that they are refusing to implement this very simple change.

But with that said, I think my one concern would be that the SBA size standard process is so slow and it does not, in my opinion, capture small businesses fairly. The current size standards have been in place since 2012 and are based on data from 2010-2011, and if you look at businesses now, it is 9 years later. They have different expectations, different operating costs. It is just not a fair representation. So I would hate for anything that would slow down the size standard process any further.

Chairman GOLDEN. Thank you, Ms. Connor.

You know, in light of the delay that is taking place I just thought I would ask if you have any questions as well in the last few seconds that I am leaving you here. You know, what confidence might the Committee have that taking, you know, the approach that you propose would not result in further delays of the process from SBA?

Ms. CONNOR. The transition period creates all winners. That is what is so great about it. If you are small under 3 years, you are still small until some date in the future. If you are small under 5 years, you are small and you can continue to pursue procurements for the next, whatever the transition period is, and then thereafter, when the 5-year rule is permanent and effective. So the transition period in my mind just creates a pool of winners instead of winners and losers. And I do not know what SBA's intent is and why they have issued that information notice and why they are slow to act. But if I had to speculate, I suspect that they might be concerned about the losers under the Runway Extension Act, i.e., the businesses that are small under 3 years but are not small under 5. And the transition period addresses what I think could be their concern. So I understand the delay but once it is in the act, and then if the Congress says that this is to be an interim final rule and comments would be allowed, then it is done.

Chairman GOLDEN. Thank you very much. My time has expired.

I now recognize the Ranking Member of the Subcommittee, Mr. Stauber, for 5 minutes.

Mr. STAUBER. Thank you, Mr. Chair.

A couple of questions or comments before I ask a question.

The passion is, I hear loudly and clearly, to immediately implement it. Mr. Black, you made a couple of comments that really resonate. Sometimes the intention or what we desire in Congress does not make it to the implementation the way it should. And so this hearing is to change it. I, as one member, hear loudly and clearly, so the goal is to make this happen, to work with the SBA to make sure that it is understood, that it helps a small business. Each and every one of you talked about how it will help us. NECA is very involved. That is very important for us to hear that. I have been a small business owner for 28 years. I get it.

And so a couple of questions I will ask Ms. Allen. You know, you mentioned in your testimony the administrator committed the agency to start working on the rulemaking immediately. Are there any consequences, both long term or otherwise for firms that might lose their small business status during these months but gain it back once the SBA issues its final ruling?

Ms. ALLEN. So, you know, uncertainty is never good, right, in small businesses. And so I would just urge honestly, whatever decision is going to be made, just make it and get it done and over with. I mean, honestly, that to me is the biggest, if I can say nothing else, it is that. But insofar as small businesses, the wishy-washy is a problem. For me as a small business, I know that it was the greatest Christmas gift I could have ever gotten because this has been weighing heavily on my head for a long time over what is going to happen to us? And we have been planning and making infrastructure changes and hiring new employees, and I know that a lot of my colleagues within the business community are doing the same. So it is super critical for us and I think that the 5-year lookback is going to be huge for us.

I do not know if that answers your question. Does that? Yes? No?

Mr. STAUBER. Not allowing our small businesses to be in limbo is critically important. That is where you are right now.

Ms. ALLEN. Absolutely.

Mr. STAUBER. And to Mr. Black, your point of looking and researching other case law, it makes sense that the intention was to have it enacted immediately.

One of the questions that I had was I know that in the small business community there are ups and downs. In any lookback, give me both a positive and a negative lookback from either the implementation or nonimplementation of this immediately. So what is the positive and what is the negative? You alluded to it but I want to hear it again.

Mr. BLACK. Okay. Well, the positive, of course, is that businesses—the small business size standard is relevant on the date you submit a proposal for contracts. That is the date. If you are small on that date and you win the contract, you are small for the rest of the life of the contract. And so that date, the benefit, if you are small, if you are small under the 5 year but not the 3 year, that means in 2019, you have opportunities that you would not otherwise have. And if there is ambiguity or SBA's Office of Hearings Appeals reaches a different opinion and a business loses a size protest, these opportunities are not coming back. 2019, they will lose the revenue. Contracts for programs are typically awarded every 5 years. It will not be coming around. They will not be small. And

so it is critical. The positive and the negative are the same thing. When it is clear you are small, you have opportunities now. When it is unclear or you are not small, you lose those opportunities and you will not get them back.

Mr. STAUBER. I just go back to the fluctuation in the mindset of the small businesses. Our goal is to make sure that you know where you sit and the rules are present today and the standards are there for the small businesses. I think all in all I really appreciate your comments and your success in small business. It is not easy.

I have said this many times in this Committee that small businesses are the engine of our economy, and I know that the Chair and I feel the same way. Coming from rural America, you are Main Street businesses and I really appreciate your testimony today.

Mr. Chair, I yield back.

Chairman GOLDEN. Thank you. The gentleman yields back.

We will now recognize the gentleman from Ohio, Representative Balderson, Ranking Member of the Subcommittee on Innovation and Workforce Development, for 5 minutes.

Mr. BALDERSON. Thank you, Chairman.

Good morning, everyone. This question is for Ms. Allen. Good morning, Ms. Allen.

In your testimony you talked about the midsize crisis of the contractual growth. Can you share how these 2 extra years from the Runway Act can help a small business successfully integrate into the open market without kicking the can down the road?

Ms. ALLEN. Yeah, though I would like to kick it further down the road. But yes.

It really helps because it gives us an opportunity to, as I said, to grow our infrastructure, to hire new employees. If we want we could acquire other small businesses to make us larger or more competitive, or to joint venture with them, to develop some of those relationships that we would not have otherwise needed. As a small business, you can kind of do your thing. You do not need to be, you know, Mammoth. You do not need to have as many joint ventures to operate. But when you are competing against the Lockheed Martins and the SAICs and Leidos of the world, you need to have a whole army of folks with you. So it would give us time to put that consortium of people together.

Mr. BALDERSON. Thank you. I have one follow-up question for you. In your opinion, how has the over the 3 or 5 year affected contracting firms' willingness to hire new employees and expand their work force?

Ms. ALLEN. Sure. I mean, any uncertainty as a business owner, you know, if I am in a position of, okay, well, so next month I am going to be small or am I going to be large? I am not going to take that risk and hire new employees. It just does not make sense to the bottom line, and then have to turn around and get rid of them because, oh, my gosh, now I cannot afford, I am not going to be able to compete for those businesses because I am no longer small. And so that really puts huge pressure on businesses. And so, yeah, whether you are large or small, that uncertainty is not good.

Mr. BALDERSON. Thank you very much for your answers. And I yield back my remaining time.

Chairman GOLDEN. The gentleman yields back his time.  
We will now recognize for 5 minutes Representative Jim Hagedorn.

Mr. HAGEDORN. Well, thank you, Mr. Chair, and Ranking Republican Member Stauber, fellow Minnesotan. It is pleasure to be here. Thanks to the witnesses and the staff and everyone.

I would first like to recognize a friend of ours who is in the audience, former Congressman Tom Davis. Tom, appreciate your public service. It is nice to see you today. Hope things are going well.

Ms. Allen, so the concept here, I guess, is that small business begins to grow, you are involved in these contracts and other things, and we should maybe set some different limitations or, you know, expand it so we do not have to just stop the whole process. I get that. We want businesses to grow. We do not want to disrupt the apple cart and all that. But, and by the way, I thought the concept of maybe the 3 lowest years, that might make more sense if you are looking over 5. But if this is a good concept and we do not want to have businesses run out of business or limited because of bad government, why do we not apply it to everything else that the government mandates? I mean, look at labor laws. Look at health care with Obamacare.

I have spoken to a lot of business owners in southern Minnesota who are concerned that their business is getting too good. They are starting to grow. They are starting to hire more people. They were thinking about going out and buying other businesses and, you know, doing all sorts of things. But because of the limits that are imposed on them and Obamacare and other statutes by the Federal Government, they had to think twice about that. And oftentimes they deferred and decided not to.

What do you think about that concept? Should we be maybe looking at other statutes and seeing how it impedes small business progress?

Ms. ALLEN. Absolutely. Amen. Let us do it.

You know, I think that anything that impedes the growth of particularly small businesses is, you know, welcome. You know, are there other statutes and limitations? I am sure there are, and I think that, yeah, that would be valuable. I think all of us would applaud that. You know, what are the right ones to change and monkey with? I will leave that in your very capable hands.

Mr. HAGEDORN. I am just saying, if this is a good idea, if this is a good bill, it seems to be bipartisan, maybe we should look to apply it to all other aspects of government to make sure our small businesses can prosper, thrive, and grow and expand and compete ultimately with bigger businesses.

With that, I yield back. Thank you.

Chairman GOLDEN. The gentleman from Minnesota has yielded back.

I will now move into a second round of questioning for those who want to. And I think I will start myself for an additional 5 minutes.

I wanted to ask Mr. Morales, I think if I understood correctly, during your testimony you were saying that under the 3-year rule in 2019, you are small. By 2020, you would have grown out of that. So I wanted to ask, or just give you another opportunity to tell us about how the delay in implementing this law has left you in limbo

with a little bit of uncertainty. How is that going to impact your planning for what you do compete for or take on in 2019 looking beyond to 2020?

Mr. MORALES. I think some background information about our company would be beneficial in this case. We started in 2014, so we are a relatively new company. Because of our tremendous growth, we have been able to go through a lot of processes that the SBA programs have helped us go through and understand. This current year is going to be our largest revenue year to date and when I was mentioning that if we continued this same type of revenue for the following year, under the 3-year rule we would lose our small business status. Now, that is not to mean the previous years in which I started the business were even close to breaching that. We just had a really good successful year this year. So again, the idea is we are a small 5-year-old company who just had a tremendous year and still are learning from the process of contracting with the government that we need to understand more formally. A big part particular to our company is we began our 8(a) application last year, midyear last year. It has been quite a bit of time that we have divested into this program. A lot of office time, a lot of monies trying to get that 8(a) certification. It is currently in the part of being processed, and if we were to continue our revenues, we would get the 8(a) in 2019 just to lose it after 2020. And that is under the 3-year rule. So if we were to have the 5-year rule implemented immediately, that would help us plan. It would help us to look at what kind of solicitations we need to do. What type of contract engagements we need to have and participate in. We also want to start in right away with creating mentorship programs under the 8(a). And if we began that process only to lose that certification because we are no longer a small business, then it would be a lot of wasted time and effort and monies also.

Chairman GOLDEN. I thought I might ask if you would just follow up in your experience. Probably you know businesses, maybe even your own, struggling with the same kind of uncertainty and challenges that Mr. Morales was talking about. But I was wondering if there are other common repercussions that you might speak to as a result of the delay of the act.

Ms. ALLEN. The delay really puts us in a precarious position because there are contracts that we would love to go after. But if we are going to be considered large we cannot. And teaming arrangements that we have put together. We do a lot of mentoring with—not formal mentoring relationships but mentoring of other small businesses that we help and they subcontract under us. And if that change happens, not only does it affect me but it affects all those other smaller small businesses that no longer can team with me. And some might say, well, we could reverse it. They are not in a position to be able to prime a contract. They are not large enough. They are not a large enough small to be able to prime those small businesses. So it really puts all of us in this really wonky period. So, yeah.

Chairman GOLDEN. Thank you all very much.

I want to thank all the witnesses for taking the time out of their schedules to be here with us today. I understand there are no additional questions.

I will say that ensuring that small businesses can thrive is the number one priority of this Committee. We have heard today the SBA's delay in the implementation of the Runway Extension Act is creating widespread confusion and uncertainty. It is clear from our hearing that there are several alternatives that can be implemented to address this issue. I look forward to working with my colleagues on both sides of the aisle to ensure that small businesses have access to Federal contracting opportunities that Congress intends so these companies can continue to grow and add jobs to the economy. I think that the Ranking Member and I agree that we are looking for the fastest solution to provide the quickest clarity for everyone that is out there that will be impacted either by further delay or hopefully a quick resolution.

With that, I would ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record.

Without objection, so ordered.

If there is no further business to come before the Committee, we are adjourned. Thank you very much.

[Whereupon, at 10:56 a.m., the Subcommittee was adjourned.]

**A P P E N D I X**

**Written Testimony of**

**Mr. David S. Black  
Government Contracts Attorney, Holland & Knight LLP**

**At the Hearing Entitled**

**"Cleared for Take-off?  
Implementation of the Small Business Runway Extension Act"**

**March 26, 2019  
10:00 a.m.**

**Before the  
House Committee on Small Business,  
Subcommittee on Contracting and Infrastructure**

Thank you Chairman Golden, Ranking Member Stauber and Members of the Subcommittee for the opportunity to submit written testimony regarding the implementation of the Small Business Runway Extension Act of 2018, which was enacted into law as Public Law No. 115-324 on December 17, 2018.

I am a government contracts attorney in the law firm of Holland & Knight LLP, where I have worked since 1998. I am Co-Chair of the Firm's National Government Contracts Team. I work in the Firm's Tysons, Virginia, office. In my practice, I provide advice and representation on a full range of issues, matters, and disputes encountered by small and mid-tier Federal contractors and subcontractors through every stage of growth. I serve contractors in a broad array of industries, with an emphasis on innovative technology, cutting-edge products, professional services, healthcare, and research and development. Many of my clients participate in small business contracting programs as either a prime contractor or subcontractor, and their eligibility as a small business concern is important to their growth and success. It is a privilege to provide some perspective today from this part of the small business contracting community.

**I. Executive Summary**

We are here today because the U.S. Small Business Administration ("SBA") is creating uncertainty and potential delay regarding an important policy imperative of Congress –

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helping small businesses service providers transition from set-aside contracting programs to full and open competition. Congress provided immediate assistance last year on December 17, 2018, when the President signed the Small Business Runway Extension Act of 2018 ("SBREA"). The SBREA amended the Small Business Act and, by operation of law, its implementing regulations to lengthen the time period service contractors compute their average annual gross receipts for size purposes from three years to five years. Unfortunately, SBA has created unnecessary confusion in the small business procurement community by erroneously claiming that the SBREA was not immediately effective and that it does not even apply to the SBA.

Congress should stand its ground in responding to the SBA's erroneous position. Under well-established principles of statutory construction and administrative law, Congress drafted SBREA in a way that clearly took immediate effect upon its enactment on December 17, 2018. The SBREA also immediately invalidated the SBA's conflicting size regulations providing for a three-year look-back period. Moreover, SBA is plainly wrong that the size standard "requirements" of 15 U.S.C. § 632(a)(2)(C)—which includes the new five-year look-back period for calculating average annual revenue—applies to every other federal agency except for the SBA. The plain language of the statute—as well as common sense policy—clearly evinces that Congress intended to create a common framework of size standard parameters within which all size standards must conform across the Executive Branch (including the SBA), including a mandatory look-back standard of at least five years for service contractors computing average annual revenue.

Furthermore, it is important for Congress to understand that **mid-tier service contractors are enjoying the benefits of SBREA now**. Such contractors have been submitting proposals in reliance upon the new five-year standard, which— notwithstanding SBA's erroneous view—has been in effect for over three months. Mid-tier service contractors who would be large under the three-year standard but small under the five-year standard are submitting proposals for small business set-aside contracts in reliance on the SBREA's five-year standard and the resulting invalidation of

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the three-year standard in the SBA's regulations. If the SBREA's implementation date is amended and delayed by Congress, these mid-tier service contractors will have no way of getting back the opportunities and revenue they miss.

Against this backdrop, Congress should be mindful that any action to delay the effectiveness of the SBREA from December 17, 2018, to some future date will hurt the mid-tier service contractors Congress intended to help (and is, in fact, helping now). Thus, from my perspective as an advisor to emerging small business contractors, I recommend that Congress consider the following options:

1. **Leave the SBREA undisturbed as enacted on December 17, 2018. Do not re-visit or amend the SBREA's clear effective date.** The SBREA was clearly effective on December 17, 2018, and mid-tier contractors are relying on it to enjoy renewed eligibility for small business set-aside contracts. There is no need to delay the effectiveness of the SBREA to some future date.
2. **Issue a clarifying amendment of Section 3 of the Small Business Act that Congress has always intended SBA to be subject to the size standard requirements applicable to "federal agencies" under Section 3(a)(2)(C).** Under well-established principles of statutory construction, amendments to clarify Congress' original intent for a statute are "non-substantive" and apply retroactively. It's clear that Congress always intended and understood when it passed SBREA that its size standard "requirements" set forth in Section 3(a)(2)(C) of the Small Business Act applies to the SBA just as it does every other agency. The gentle way for Congress to correct the SBA is through a clarifying amendment.
3. **Consider mitigating the impact of the SBREA on "backsliding" service contractors, but do not delay the immediate effectiveness of the SBREA for emerging mid-tier service contractors.** While it is

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possible the SBREA may have the effect of keeping some business with declining revenues from renewed eligibility for set-aside contracts, my personal “hunch” based on anecdotal experience is that the number of these contractors is fewer than the number of contractors that the SBREA has been helping since December. If Congress decides to grant some relief to “backsliding” contractors, it is consistent with Congress’ overall policy to avoid delaying the effectiveness of the SBREA to the community of growing service contractors.

4. **Consider whether to “extend the runway” for manufacturing contractors under employee size standards, *but do not delay the immediate effectiveness of the SBREA for emerging mid-tier service contractors.*** The SBREA only amended the look-back period for calculating average annual revenue, which applies to size standards for service industries. Congress did not amend the look-back period for calculating average monthly employee headcount, which applies to size standards for manufacturing industries. It is worthwhile to study whether similar changes should be made to the employee headcount standards. But it is not necessary to link this amendment to the implementation of the SBREA’s five-year look-back period for service contractors. Again, the SBREA became effective December 17, 2018, and the industry has since been acting in reliance upon it. Rather than hurt mid-tier service contractors by delaying effectiveness of the five-year period until some future date, Congress should keep it in place and address the size standard for manufacturing in a separate legislative amendment.

## II. SBREA’s Enactment

On December 17, 2018, Congress laudably completed a nearly year-long effort to amend the size standards under Section 3 of the Small Business Act to “help advanced-small business contractors successfully navigate the middle market as they reach the upper limits of their small size standard.” H.R. Rep. No. 115-939, at 1 (2018).

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Congress enacted, and the President signed, the SBREA, which lengthened the time in which federal agencies (including the U.S. Small Business Administration) measures the size of a business concern providing services on the basis of average annual gross receipts. Specifically, Congress amended Section 3(a)(2)(C)(ii)(II) of the Act (codified at 15 U.S.C. § 632(a)(2)(C)(ii)(II)) so that the size of such service contractors shall be determined based on average annual gross receipts over a period of not less than **five** years (extended from the prior statutory period of not less than **three** years).

Congress went through a thorough legislative process in enacting the SBREA. On April 26, 2018, the Committee on Small Business Subcommittee on Contracting and Workforce met for a hearing titled "No Man's Land: Middle-Market Challenges for Small Business Graduates." On September 12, 2018, the House Committee on Small Business issued a report on SBREA. See H.R. Rep. No. 115-939 (2018). On December 11, 2018, the Senate Committee on Small Business did the same. See S. Rep. No. 115-431 (2018).

In its committee reports, Congress discussed the current situation for mid-sized businesses and the need for the legislation to provide mid-sized and advanced small businesses an extended runway before they outgrow their size standards and becoming eligible only for full and open competition. After outgrowing their applicable small business size standard, mid-size contractors face several competitive disadvantages against the large, billion-dollar companies that they must now compete against, making true competition illusory and potentially freezing emerging small and mid-sized contractors out of the marketplace:

The "other-than-small" category includes firms that have just graduated out of their small business size by mere dollars, through the entire middle-market spectrum, to also include the large, billion-dollar companies. These large companies have several competitive advantages over small and mid-size firms, making true competition illusory. For instance,

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large companies have vast past performance qualifications, strong brand-name recognition and agency ties, as well as a multitude of professional certifications, clearances, and greater financial resources. Small and mid-size businesses cannot afford to maintain these resources, leaving them at a considerable disadvantage. These advantages by large firms can have a chilling effect, potentially freezing out emerging advanced small companies.

H.R. Rep. No. 115-939, at 4 (2018).

In addition, large businesses are now increasing competing for mid-size agency contract that are most suitable for mid-sized contractors:

Additionally, large businesses, which once competed primarily for large, high-dollar contracts, are now increasingly competing for contracts across the spectrum, including those contracts that are most suitable for mid-sized and advanced-small businesses. This puts additional pressure on mid-size firms, particularly those emergent, advanced-small businesses.

H.R. Rep. No. 115-939, at 4-5 (2018). "In sum, these mid-size companies occupy a unique position in the federal marketplace—they are too big to qualify for small business preferences and often lack the resources to compete with larger contractors." S. Rep. No. 115-431 at 3.

To resolve these concerns, Congress passed the SBREA legislation "to provide a longer time period for which a business may be qualified as small, arguing that this will improve the health of the industrial base, increase competition resulting in lower prices, and create and preserve jobs." H.R. Rep. No. 115-939, at 6. "Th[e] legislation will allow small businesses at every level more time to grow and develop their

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competitiveness and infrastructure, before entering the open marketplace." H.R. Rep. No. 115-939, at 2. "The bill will also protect federal investment in SBA's small business programs by promoting greater chances of success in the middle market for newly-graduated firms, resulting in enhanced competition against large prime contractors." H.R. Rep. No. 115-939, at 2.

### III. The SBREA's Immediate Legal Effect as of December 17, 2018

Under well-established principles of statutory construction and administrative law, the SBREA took *immediate effect* and *immediately invalidated* the conflicting "three-year" standard for computing average annual gross receipts of service contractors in SBA's regulations:

- **Congress was clear that the SBREA is effective *immediately*.** The SBREA directly amended the Small Business Act without providing that effectiveness would be delayed until rulemaking was completed. Although no effective date is specified, under established principles of statutory construction, "the omission of an express effective date simply indicates that, *absent clear congressional direction, it takes effect on its enactment date.*" *Johnson v. United States*, 529 U.S. 694, 695 (2000) (emphasis added).
- **The three-year standard in SBA's current regulations (13 C.F.R. § 121.104(c)) was invalidated by the conflict with the amended Small Business Act, under well-established principles of administrative law.** See, e.g., *Farrell v. United States*, 313 F.3d 1214, 1219 (9th Cir. 2002) ("It is well-settled that when a regulation conflicts with a subsequently enacted statute, the statute controls and voids the regulation."); *Scofield v. Lewis*, 251 F.2d 128, 132 (5th Cir. 1958) ("A regulation, valid when promulgated, becomes invalid upon the enactment of a statute in conflict with the regulation."); see also *Kievenaar v. Office of Personnel Management*, 421 F.3d 1359, 1364-65 (Fed. Cir. 2005) (holding that a regulation that conflicts with a subsequently amended statute is ineffective).

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**IV. The SBA's Erroneous View that the SBREA is Neither Effective Nor Applicable to the SBA**

Since the SBREA's passage, the SBA has created unnecessary confusion regarding the SBREA's implementation by erroneously concluding that the absence of an express effective date in the statute means that the SBREA has no legal effect until the SBA amends its regulations. In an "SBA Information Notice" issued on December 21, 2018, to all Government Contracting Business Development ("GCBD") employees, the SBA explained:

SBA is receiving inquiries about whether the Runway Extension Act is effective immediately—that is, whether businesses can report their size today based on annual average receipts over five years instead of annual average receipts over three years. The Small Business Act still requires that new size standards be approved by the Administrator through a rulemaking process. **The Runway Extension Act does not include an effective date, and the amended section 3(a)(2)(C)(ii)(II) does not make a five-year average effective immediately.**

**The change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process.** The Office of Government Contracting and Business Development (GCBD) is drafting revisions to SBA's regulations and SBA's forms to implement the Runway Extension Act. Until SBA changes its regulations, businesses still must report their receipts based on a three-year average.

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(emphasis added.) (For the Subcommittee's convenience, a copy of the SBA's Information Notice regarding the SBREA, assigned Control No. 6000-180022, is attached.)

As noted above, the SBA's analysis and conclusion are plainly wrong and are likewise squarely refuted by longstanding principles of statutory construction applied by the United States Supreme Court ("Supreme Court"). The absence of an express effective date does not mean that the SBREA's effectiveness is suspended indefinitely. To the contrary, it means that SBREA took **immediate effect on December 17, 2018**. As the Supreme Court has explained, "the omission of an express effective date simply indicates that, absent clear congressional direction, **it takes effect on its enactment date**." *Johnson*, 529 U.S. at 694-95 (citing *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)) (emphasis added).

The SBA has offered an additionally faulty reason regarding why it believes the SBREA does not invalidate any of the SBA's regulations. The SBA takes the view that it is exempt from the small business size standard "requirements" of 15 U.S.C. § 632(a)(2)(C), including the standard for computing average annual gross receipts for service companies. The SBA's view is based on a plainly erroneous reading of the statutory text and flies in the face of congressional intent to establish size standard requirements for all "federal agencies"— including the SBA.

As noted above, "[i]t is well-settled that when a regulation conflicts with a subsequently enacted statute, the statute controls and voids the regulation." *Farrell*, 313 F.3d at 1219. The SBA's position is that the three-year standard in its regulations remains valid because there is no legal "conflict" between § 632(a)(2)(C) and the SBA's regulations. The SBA reasons this is the case because Congress did not intend for the SBA to be subject to § 632(a)(2)(C). If the SBA is exempt from § 632(a)(2)(C), goes the argument, then there is no "conflict" between the SBREA's amendment of § 632(a)(2)(C) and the SBA's current regulations.

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However, the notion that the SBA is somehow exempt from the size standard requirements of § 632(a)(2)(C) is plainly wrong:

- By the plain and clear meaning of its text, § 632(a)(2)(C) applies to all federal agencies, including SBA. By its own terms, § 632(a)(2)(C) applies **to every** “federal department or agency,” **which is defined in § 632(b)** to as having “the meaning given to the term ‘agency’ by section 551(1) of title 5, but does not include the United States Postal Service or the Government Accountability Office.” **There is no dispute that SBA falls within the definition of “agency” in 5 USC 551(1).**
- There is one possible way for SBA to exempt from § 632(a)(2)(C), which states that the size standard requirements apply to all federal agencies, “**unless specifically authorized by statute.**” (emphasis added.) SBA asserts that it derives its legal authority to issue size standards under § 632(a)(2)(A), which states as follows:

In addition to the criteria specified in paragraph (1),<sup>1</sup> the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purpose of this chapter or any other Act.

It is clear from the plain text of § 632(a)(2)(A) that **Congress has not provided any “specific authorization” for the SBA to prescribe size standards that do not meet the requirements of § 632(a)(2)(C).** This provision sets forth a general authority for the SBA Administrator to specify detailed definitions or standards for small business concerns, with not specific authorization to be exempt from § 632(a)(2)(C). If Congress

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<sup>1</sup> “Paragraph (1)” refers to § 632(a)(1), which states: “For the purposes of this chapter, a small-business concern, including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation.”

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March 26, 2019

had intended to specifically authorize the SBA to be free of these requirements, it would have specifically stated in § 632(a)(2)(A) that "the Administrator is authorized to prescribe size standards for categorizing business concerns as small business concerns that do not conform to the requirements of § 632(a)(2)(C)." Of course, § 632(a)(2)(A) contains no such specific authorization because Congress intended the SBA's size standards to comply with the requirements of § 632(a)(2)(C).<sup>2</sup>

SBA's position makes no sense as a matter of public policy. Under the SBA's view, Congress intended to create two sets of size standards for the federal government: one established by non-SBA federal agencies subject to the requirements of § 632(a)(2)(C) and another set established by SBA that are unbound and free to contradict the requirements of § 632(a)(2)(C). Such a balkanization of size standards across the federal government would create confusion and divergent outcomes across the SBA and non-SBA programs, and remove Congress from having any role in setting parameters for the size standards issued by the SBA. This is not what Congress intended.

It is clear that Congress understood that § 632(a)(2)(C) *applies to the SBA* when it passed the SBREA. In fact, the clear intention of Congress, as expressed in both the House and Senate reports on the legislation, was to grant mid-size service contractors immediate relief by changing the "SBA's" size standards:

- "H.R. 6330 lengthens the time in which the *Small Business Administration (SBA)* measures size through revenue, from the average of the past 3 years to the average of the past 5 years." H.R. Rep. No. 115-939, at 2 (emphasis added).
- The SBREA "amends the Small Business Act by lengthening the time *the SBA* measures size through revenue, using the average of the preceding five years

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<sup>2</sup> A review of all Federal court decisions reveals that there are no judicial decisions addressing (much less supporting) SBA's interpretation that its regulatory authority under 632(a)(2)(A) is not subject to the requirements of 632(a)(2)(C).

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instead of the preceding three years.” S. Rep. No. 115-431, at 3-4 (emphasis added).

**V. Consideration of Options for Congressional Response**

**1. Stay the Course: Do Not Delay the Effective Date of the SBREA past December 17, 2018.**

Congress should not allow SBA to thwart and delay the important work Congress completed in December 2018 with the enactment of the SBREA. As noted above, Congress drafted the SBREA in such a way that it took immediate effect and immediately invalidated the old three-year standard for calculating the average annual revenue of service contractors in the SBA's regulations.

The SBREA is already doing what Congress hoped: benefiting mid-tier service contractors, who would experience financial hardship if Congress reverses course and elects to delay the effectiveness of the SBREA until some future date. Service contractors who are small under the five-year standard of SBREA but large under the old three-year standard are now bidding on small business set-aside contracts in reliance on the SBREA's immediate effectiveness. Although the System for Award Management (“SAM”) will require updating to incorporate the new five-year standard for determining average annual revenue, contractors may make (and are making) size representations based upon the current five-year standard manually in their proposals for set-aside contracts. Thus, notwithstanding the time it will take to update SAM, both offerors and contracting agencies have an effective method to make and accept size standards based on the SBREA's five-year standard.

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**2. Gently Resolve the SBA's Confusion About the Scope of its Regulatory Authority by Issuing a "Clarifying" Amendment of Section 3 of the Small Business Act Confirming that the SBA Has Always Been Subject to § 632(a)(2)(C).**

Congress should be mindful that it is **Congress** (and not the SBA) that determines the meaning and purpose of the Small Business Act. Just because the SBA adopts a view of its regulatory authority regarding size standards, which is clearly at odds with the plain text of the Small Business Act, is no reason to delay the immediate effectiveness of the SBREA and the relief it affords to service contractors who are now "small" under the new five-year average annual revenue standard but would otherwise be "large" and ineligible for small business set-aside contracts under the old three-year standard.

A plain reading of § 632(a)(2)(A) and subsection (a)(2)(C) makes clear that Congress did not intend for the SBA to have broader authority than other federal agencies when issuing size standards. Congress implemented a policy of uniformity among all federal agencies, including the SBA, when prescribing size standards and intended that all such size standard meet the minimum requirements of § 632(a)(2)(C). Congress had yet to enact any specific statutory authority for the SBA to be exempt from § 632(a)(2)(C).

Instead, Congress should act gently act to resolve the SBA's overstated view of its regulatory authority by issuing a simple clarifying amendment confirming that Congress always intended that the SBA was among the "federal agencies" subject to the small business size "requirements" of § 632(a)(2)(C). It is well established that a "clarifying amendment" of a statute by which "Congress necessarily was merely restating the intent of the original enacting Congress" has retrospective effect. *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1282 (10th Cir. 2010). Thus, such a clarifying, non-substantive amendment would apply retroactively and provide continuity and stability regarding the parameters surrounding the SBA's regulatory authority.

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### 3. Timing Considerations regarding “Backsliding” Mid-Tier Service Contractors

It has come to the Subcommittee’s attention that the SBREA may have the effect of “hurting” some mid-size service contractors who have been struggling as “large” businesses for the past few years. There is a possible scenario where a company that had big revenue years four or five years ago but have experienced declining revenues in the past three years will have to wait a longer period before qualifying as “small” because the SBREA’s five-year standard keeps their average annual gross receipts above the applicable size standard.

I do not have any hard data on the number of contractors who are benefiting from the five-year standard compared with the number of concerns who will be delated from small business eligibility by it. Anecdotally, my own limited experience suggests that there are more growing businesses assisted by the SBREA than “backsliding” businesses harmed by it.

That said, as Congress considers what, if anything, it should do to assist these “backsliding” mid-tier service contractors, it should be mindful that it has **already enacted** the five-year standard, which has been in effect since December 17, 2018. Taking action to delay the effectiveness of the SBREA by a year or more will hurt the growing businesses who are presently benefitting from the law by enjoying extended small business eligibility in 2019. Any action by Congress should not disturb the effectiveness of the SBREA as applying to growing service contractors, and Congress should continue to allow these contractors to submit proposals in reliance on the five-year standard. There are ways to take legislative action to assist “backsliding” contractors that do not require or involve amending the December 17, 2018, effective date of the SBREA as applied to growing service contractors.

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**4. Timing Considerations regarding Amending the Look-Back Period  
for “Manufacturing” (Employee-Based) Size Standards**

The SBREA amended only the look-back period for calculating average annual gross receipts for size standards that apply generally to service industries. Congress has not amended the 12-month standard for determining the monthly average number of employees, which is the size standard that generally applies to contractors in manufacturing industries. The question has been raised whether Congress should seek to “extend the runway” for emerging small business manufacturers like it has for service providers.

This is an issue that warrants Congress' consideration.<sup>3</sup> But it should not be linked to, or otherwise delay, the implementation of the five-year standard under the SBREA. Congress can take separate legislative action that amend § 632(a)(2)(C) to “catch up” the employee-based size standards with the amendments Congress has already made to the revenue-based size standards. But it would thwart the policy goal of the SBREA to delay implementation of the five-year standard that is already benefiting mid-tier service contractors.

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<sup>3</sup> One idea is to amend the look-back period for calculating average monthly headcount by the same proportion (3:5) as the period for average annual gross receipts was lengthened. In the case of the 12-month look-back period for average employment, Congress could strike “preceding 12 months” from § 632(a)(2)(C)(ii)(I) and replace it with “preceding 20 months” – the equivalent of a 3:5 proportional increase in the look-back period. There could be other adjustments as well that may be more appropriate under the circumstances of employment headcounts or manufacturing-specific industries.



## SBA Information Notice

**TO:** All GCBD Employees

**CONTROL NO.:** 6000-180022

**SUBJECT:** Small Business Runway Extension Act of 2018

**EFFECTIVE:** 12-21-18

On December 17, 2018, President Trump signed Public Law No. 115-324, the Small Business Runway Extension Act of 2018 (Runway Extension Act). The Runway Extension Act amends section 3(a)(2)(C)(ii)(II) of the Small Business Act as reflected in the appendix (next page) to this notice. In short, the Runway Extension Act modifies the method for prescribing size standards for small businesses. Under prior law, firms in industries with receipts-based size standards calculated size based on annual average gross receipts over three years. The Runway Extension Act provides that, unless specifically authorized by statute, receipts-based size standards be based on annual average gross receipts over five years.

SBA is receiving inquiries about whether the Runway Extension Act is effective immediately—that is, whether businesses can report their size today based on annual average receipts over five years instead of annual average receipts over three years. The Small Business Act still requires that new size standards be approved by the Administrator through a rulemaking process. The Runway Extension Act does not include an effective date, and the amended section 3(a)(2)(C)(ii)(II) does not make a five-year average effective immediately.

The change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process. The Office of Government Contracting and Business Development (GCBD) is drafting revisions to SBA's regulations and SBA's forms to implement the Runway Extension Act. Until SBA changes its regulations, businesses still must report their receipts based on a three-year average.

For more information about the Runway Extension Act, you may contact Khem Sharma, Chief, Office of Size Standards, at (202) 205-7189, or Sam Le of the Office of General Counsel at (202) 619-1789.

Robb N. Wong  
Associate Administrator  
Office of Government Contracting and Business Development

**EXPIRES:** 12-01-19

**PAGE 1**

SBA Form 1353.3 (4-93) MS Word Edition; previous editions obsolete  
Must be accompanied by SBA Form 58

## Appendix

## Section 3(a)(2)(C)(ii)(II) of the Small Business Act, 15 U.S.C. § 632(a)(2)(C)(ii)(II)

## SEC. 3. DEFINITIONS.

## (a) Small Business Concerns.--

(1) \* \* \*

## (2) Establishment of size standards.--

(A) In general.--In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this Act or any other Act.

(B) Additional criteria.--The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors.

(C) Requirements.--Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard--

(i) is proposed after an opportunity for public notice and comment;

(ii) provides for determining--

(I) the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months;

(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than [3 years] 5 years;

(III) the size of other business concerns on the basis of data over a period of not less than 3 years; or

(IV) other appropriate factors; and

(iii) is approved by the Administrator.



Written Testimony of

Megan C. Connor  
Partner  
PilieroMazza PLLC

Before the  
House Committee on Small Business  
Subcommittee on Contracting and Infrastructure

“Cleared for Take-off? Implementation of the  
Small Business Runway Extension Act”

March 26, 2019

Good morning, Chairman Golden, Ranking Member Stauber, and Distinguished Members of the Subcommittee. Thank you for the opportunity to appear before you today. My name is Megan Connor, and I am a partner at PilieroMazza PLLC, a law firm serving government contractors for over 30 years. I am joined today by our managing partner, Pam Mazza. We represent government contractors of all sizes and in a variety of industries. Many of our clients, though, are small businesses directly impacted by the Small Business Runway Extension Act of 2018 (“Runway Extension Act”).

Our firm supports the Runway Extension Act and, specifically, changing how small businesses calculate their receipts from a three-year basis to a five-year basis. However, we believe that, in implementing this change, there are three issues that need to be addressed in order to avoid negative impacts on small businesses. First, small businesses deserve clarity as to the effective date of the change from three years to five years. Second, we strongly recommend a transition period during which firms that are small under a three-year calculation, but not small under a five-year calculation, are able to adjust to the marketplace. Third, the System for Award Management database must be updated to account for this change. I will address each of these issues in turn.

#### **Effective Date**

First, there is widespread confusion in industry as to whether the Runway Extension Act—which was signed into law on December 17, 2018—is actually in effect. Our firm receives questions from clients on a nearly daily basis about the Act and the impact it has on the client’s size calculation. This confusion arises from the fact that, while the Act amended the Small Business Act to provide that a firm’s receipts calculation shall be based on five years, the Small Business Administration’s (“SBA”) regulations still state that receipts are to be calculated based

on the average of the three recently completed fiscal years.<sup>1</sup> While we would normally advise clients that federal law supersedes federal regulations, SBA issued an internal Information Notice to SBA employees on December 21, 2018, stating that “[t]he change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process.”<sup>2</sup> Therefore, notwithstanding the Runway Extension Act’s change to the Small Business Act, SBA expects contractors to calculate their size for a receipts-based size standard based on a three-year average.

To illustrate the confusion this is creating, a client of ours submitted a proposal in October 2018, when the company was small under a three-year calculation. As of January 1, 2019, that company is no longer small under a three-year calculation, but remains small under a five-year calculation. This company was elated with the change made by the Runway Extension Act and its ability to continue pursuing small business contracts. But two weeks ago, the procuring agency sent them correspondence regarding the October 2018 proposal and asked the company to submit a proposal revision and include, among other things, updated representations and certifications of size. In response, the company reiterated that it was small at the time of its initial proposal with price, which is the relevant date for size purposes,<sup>3</sup> and also provided updated representations and certifications that it remains a small business pursuant to the Runway Extension Act. This company, and others like it, should be able to take advantage of the Runway Extension Act now.

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<sup>1</sup> See 13 C.F.R. § 121.104(c)(1).

<sup>2</sup> SMALL BUSINESS ADMINISTRATION, SBA Information Notice Control No. 6000-180022 (Dec. 21, 2018), available at <http://theegp.org/images/Information-Notice-6000-180022-re-Small-Business-Runway-Extension-Act.pdf>.

<sup>3</sup> See 13 C.F.R. § 121.404(a).

Accordingly, we recommend that Congress make clear its intent as to the effective date of the Runway Extension Act. It is my understanding that the Committee is currently drafting legislation to address this, which is welcome news. We appreciate the Committee's efforts and urge the Committee to consider, when establishing an effective date, how firms that are benefitted by the Act may take advantage of it as of the date it became law.

#### **Transition Period**

The second issue the Committee should address in implementing the Runway Extension Act is a transition period that would allow firms that are small under a three-year calculation, but not small under a five-year calculation, to adjust to this change. It was clearly the Committee's intent that the Runway Extension Act would "allow small businesses at every level more time to grow and develop their competitiveness and infrastructure, before entering the open marketplace."<sup>4</sup> However, by extending the time period for the receipts calculation, the Committee may have assumed that revenues either remain stagnant or grow year-to-year at a steady rate. While this may be true for some companies, it is not true for all.

Indeed, the reality is that the Runway Extension Act unintentionally may harm small businesses that are experiencing financial downturns—for example, if a contractor unexpectedly loses a valuable follow-on contract or graduates from SBA's 8(a) Program and is no longer eligible for 8(a) contracts. In both scenarios, the contractor often experiences a decrease in revenues after years of increases.

To illustrate, Company A, an information technology ("IT") contractor, has had revenues grow by exactly 9% every year for the last five years:

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<sup>4</sup> H.R. Rep. No. 115-939, at 2 (2018).

<b>Company A</b>		
<b>Fiscal Year</b>	<b>Total Receipts</b>	<b>Growth</b>
2014	\$22,000,000.00	
2015	\$23,760,000.00	+9%
2016	\$25,660,800.00	+9%
2017	\$27,713,664.00	+9%
2018	\$29,930,757.12	+9%

Company A's current size calculation is \$27,768,407, based on its three recently completed fiscal years (2016-2018), and it is therefore considered "other than small" for IT contracts under the \$27.5 million size standard. But if Company A's size is calculated based on the last five fiscal years (2014-2018), pursuant to the Runway Extension Act, Company A's current size is \$25,813,044, which would make Company A a small business again under the \$27.5 million size standard. Company A is a winner under the Runway Extension Act.

Now, let us consider Company B, another IT firm, which has had extreme growth and downturns over the last five years:

<b>Company B</b>		
<b>Fiscal Year</b>	<b>Total Receipts</b>	<b>Growth</b>
2014	\$35,000,000.00	
2015	\$40,000,000.00	+14%
2016	\$30,800,000.00	-23%
2017	\$27,400,000.00	-11%
2018	\$23,100,000.00	-16%

These fluctuations could be driven by the types of contracts Company B has. For instance, if Company B is a contract holder on a large contract vehicle and won large-dollar but short-term task orders in some of the recent fiscal years, but not every year, then it could experience these swings. Company B's current size calculation, based on its three recently completed fiscal years (2016-2018), is \$27,100,000. Therefore, under SBA's current regulations, Company B is small for purposes of a \$27.5 million size standard. If Company B's receipts for the last five fiscal years (2014-2018) are averaged, though, Company B will be over the \$27.5 million size standard

and no longer considered small. Company B, therefore, is a loser under the Runway Extension Act.<sup>5</sup>

To address this inequity, small businesses should be given the option to choose which calculation is most favorable for them—three years versus five years—for a transition period. In this way, firms that are no longer considered small under a five-year calculation will have time to prepare to compete as a so-called mid-sized firm in the unrestricted marketplace.<sup>6</sup> Such preparations could include identifying opportunities in industries with larger size standards, small businesses with which to form a mentor-protégé relationship, and teaming partners with which to pursue both set-aside and unrestricted opportunities.

#### **System for Award Management**

Lastly, in implementing the Runway Extension Act, the System for Award Management (“SAM”) should be updated to account for the change from three years to five years. SAM is a federal database of contractors doing business with the government. Except in narrow circumstances, all contractors pursuing work with the federal government must register in SAM.<sup>7</sup> In order to be registered in SAM, firms must complete representations and certifications, including of the firm’s size for purposes of federal procurement.<sup>8</sup> When completing SAM

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<sup>5</sup> These “Company A” and “Company B” examples were originally published in a post for the PilieroMazza blog. See Megan C. Connor, *New Receipts Calculation for Federal Contractors?*, PILIEROMAZZA BLOG (Sept. 26, 2018), <https://www.pilieromazza.com/new-receipts-calculation-for-federal-contractors>.

<sup>6</sup> The Committee recognized the pressures on “other than small” firms that barely exceed the size standards applicable to their contracts, and are therefore considered mid-sized, but must compete against multi-billion dollar companies. See H.R. Rep. No. 115-939, at 3 (2018).

<sup>7</sup> See 48 C.F.R. § 4.1102(a).

<sup>8</sup> See 48 C.F.R. § 52.204-7(a).

registration, contractors must insert one amount representing their three-year average receipts.<sup>9</sup> To conform to the Runway Extension Act, SAM should be updated to request a five-year average receipts calculation.

**Conclusion**

In conclusion, the Runway Extension Act is a positive change for government contractors, but in implementing it, any potential negative impacts should be mitigated through clarity for industry, a transition period for firms that are not benefitted by the change, and an update to SAM.

On behalf of PilieroMazza and the government contractors we represent, I would like to commend the Committee for continuing to consider how best to implement the Runway Extension Act. And I would like to thank the Committee again for the opportunity to appear before you today. I look forward to your questions.

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<sup>9</sup> This amount is then used to auto-populate a size certifications chart in SAM with “Y” and “N” to indicate whether the company is a small business for its designated North American Industry Classification System codes.



Statement of Brian Morales  
President and CEO  
of Pro-Cal Lighting

on behalf of the  
National Electrical Contractors Association  
to the Committee on Small Business Subcommittee on  
Contracting and Infrastructure  
U.S. House of Representatives

for a hearing on:

“Cleared for Take-off? Implementation of the Small Business  
Runway Extension Act”

March 26, 2019

NECA is the voice of the \$171 billion electrical construction industry that brings power, light and communication technology to buildings and communities across the U.S. Our national office and 118 local chapters advance the industry through advocacy, education, research and standards development. A diverse group of nearly 4,000 member companies account for approximately 300 million manhours per year.

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**Statement of Mr. Brian Morales  
President and CEO of Pro-Cal Lighting  
On behalf of the National Electrical Contractors Association  
Committee on Small Business Subcommittee on Contracting and Infrastructure  
March 26, 2019**

Thank you, Chairman Golden, Ranking Member Stauber, and members of the subcommittee for inviting me to testify today. On behalf of the National Electrical Contractors Association (NECA) and Pro-Cal Lighting, we greatly appreciate the opportunity to submit a statement for the record to the House Small Business Subcommittee on Contracting and Infrastructure. The subcommittee is to be commended for holding this hearing to better implement and enact the prudent bipartisan reforms signed into law in the previous Congress.

My name is Brian Morales and I am the President and CEO of Pro-Cal Lighting in Vista, California. As a second generation Mexican American and participant of the NECA/IBEW apprenticeship program, I founded my company in 2014 with my father, Anthony Morales, a Purple Heart recipient and Vietnam War veteran. Since that day, Pro-Cal has provided energy efficient design and installations to public schools, government buildings, and some of our nation's largest private industries. In each year since we broke ground, our company has doubled in revenue and now employs over 50 trained and skilled electricians with plans to hire 16 more this year.

As a small business, Pro-Cal Lighting encountered numerous hurdles related to financial risks, access to capital, and finding a trained workforce. To overcome these and other hurdles, Pro-Cal Lighting found an immediate need to partner with the National Electrical Contractors Association. Our partnership with the 117-year-old association has allowed us to take advantage of the expert apprenticeship training programs while strategically utilizing industry resources like government small business lending programs and free SBA training in government contracting. The association and these programs have afforded Pro-Cal Lighting the support it needed to continue to provide job opportunities to a diverse workforce while implementing appropriate growth strategies.

We at Pro-Cal Lighting are proud members of the National Electrical Contractors Association, which serves as the voice of the 171 billion-dollar electrical construction industry that brings power, light, and communication technology to buildings and communities across the U.S. NECA's national office and 118 local chapters advance the industry through advocacy, education, research and standards development. A diverse group of nearly 4,000 member-companies account for approximately 300 million hours worked each year across the country.

While working with NECA, I have had the pleasure to serve as a member of the Diversity Engagement Council (DEC) which represents the minority-owned and disadvantaged businesses within NECA's membership and endeavors to build an environment that embraces diversity as an integral factor for ensuring the electrical construction industry's viability. This group has been working to support governmental efforts related to business development, capacity building, career advancement, and involvement opportunities for people from all backgrounds, races, nationalities, genders, sexual orientations, and disabilities.

While both the DEC and our business are young, we at Pro-Cal Lighting hold an optimistic outlook for the years to come; we intend to weather the ups-and-downs of the

volatile construction industry through our partnership with NECA and our willingness to utilize the programs you all seek to better legislatively.

### **SMALL BUSINESS AND STABILITY HURDLES**

#### ***RISK AND GROWTH:***

Risk is inherent with any business venture and a successful entrepreneur knows how to navigate this risk. In order to build a sustainable business and avoid undo exposure, a business owner must be informed. For my company to continue to grow, our team needs to consider the competition's approach and determine what level of risk we have through formal request for information and clear deliverables. The small business classification has allowed and continues to allow Pro-Cal Lighting and many other NECA contractors the opportunity to understand this risk, learn from it, and be better suited to grow.

The bidding process is complex and competitive, and often pits small businesses against larger more experienced contractors. To a subcontractor a bid for work is an extension of risk; they must be confident that the bid submitted for the proposed work is accurate and free of all maladies. Business training along with industry insight and experience provide a small contractor the best opportunity to become a successful bidder and therefore a successful business.

In contrast to a small construction firm whose failure to bid a job appropriately means life and death, a larger company, that holds a greater amount of liquidated cash has the ability to recoup losses on a poorly structure bid by pulling funding from other sources. We have seen numerous small business fall into bankruptcy from failed business ventures characterized by low-profit, high-risk margins and fueled by misinformation or lack of industry and business knowledge. What the small business classification does for companies like Pro-Cal Lighting is limit exposure while opening up other doors for strategic growth.

On a personal note to Pro-Cal Lighting, the small business classification has opened opportunities for us to sit at the table of government procurement and competitively offer our services; while understanding the demands and requirements placed on government contractors. In addition, we have attended procurement workshops and created relationships with vendors that have allowed us to be more competitive. Because of our small business classification, we have been able to competitively secure government subcontracts working on energy efficiency projects at the Marine Corps Recruit Depot in San Diego and the Customs and Border Patrol Facilities in San Diego and Orange counties. The Small Business Administration certification allows us to present our company in a satisfactory way while mitigating our risk of over exposure.

#### ***WORKFORCE AND INDUSTRY RESOURCES:***

With our economy returning to its pre-2008 levels and markets on a robust upward trajectory, the construction industry has seen a clear increase in work. All across the country, work has become so plentiful that NECA contractors are extraordinarily hard-pressed to find enough skilled workers to complete the job. While there are numerous causes for the

workforce shortage in the country, it is undeniable that its effects on small businesses are profound and cannot be overstated.

In response to this challenge, NECA has turned to its 70-year-old partnership that produces the best electricians in our industry, the National Joint Apprenticeship Training Program (NJATC) run by NECA and the IBEW. The newly rechristened and jointly managed "*Electrical Training ALLIANCE*" invests well over \$300 million in private funds annually into the largest and most successful apprenticeship training program in the nation.

Over the decades this program has shown its ability to transform apprentices, even those without any prior knowledge of the craft, into full-fledged, high-skilled, journeymen and journeywoman. The NECA/IBEW apprenticeship is a full-time blended learning education, meaning time is spent both in a classroom and on the construction site. The goal of this program has always been and will remain to be providing the electrical construction industry with the highest level of trained and skilled workers possible. To accomplish this, apprentices receive a required 8,000 hours of on-the-job training and 900 hours of classroom time. Throughout this three to five-year education (varying on locale), all electrical apprentices receive incremental raises as they reach certain milestones. We take pride that they are not a burden to the taxpayers because the training is fully funded by the industry without any taxpayer assistance. Instead, our apprentices and others in the program contribute in excess of \$600 million dollars in federal, state, and local taxes each year. Lastly, they receive retirement plans and medical coverage for themselves and their families provided at no cost to the American taxpayer.

This Congress and many past, have made clear that addressing our nation's current and future employment needs is critically important to expanding and rebuilding our nation. We at NECA and Pro-Cal Lighting believe the existing apprenticeship structure provided by the construction trades is a sure-fire bet for success, particularly for small businesses.

Upon realizing the need to be involved in developing the next generation of trade professionals, I became focused on creating platforms for under-represented minorities to excel. In partnership with a local high school I then created an apprenticeship readiness program that recognizes the emerging opportunities in energy and green building. A majority of the students in our program are second generation Hispanic Americans who are further driven by seeing someone like themselves running a successful multi-million-dollar company. It is programs like this, building from the ground up, that will begin to chip away at the institutional roadblocks to our small businesses having a well-educated, diversified workforce to draw from.

To compliment this grassroots work, NECA in 2018 formed its Diversity Engagement Council (DEC). This governmentally focused contingent is made up of construction professionals from all over the country, from Detroit to New Orleans, from New York to San Diego. These contractors are committed to growing the diversity of their industry and working with elected officials to collectively bettering the contracting environment. A key pillar to NECA's DEC has been spreading the conversation on best practices and regulations that our smaller and disadvantaged contractors have experienced over the years. We believe that through efforts like the DEC and my own, we can diversify our solutions to the workforce shortage while bettering our small businesses economically.

In addition to our involvement with the NECA/IBEW apprenticeship and NECA's Diversity Engagement Council, Pro-Cal Lighting has had the opportunity to take advantage of a variety of

industry resources via the small business classification; these resources have in-turn allowed our company to hire a more diverse workforce. Tools like the previously mentioned small business loan program gave our company the ability to challenge the risks of the construction industry and to win work which then permitted our staff, office administration, and our field electricians to grow professionally. Due to the requirements of federal contractors to be proficient in record keeping and safety, upon winning federal work our staff was required to receive additional training and certifications ultimately making them better suited to win more work in the future. Much of this training was free, and all of it has been appreciated.

While there is nationwide concern over the workforce shortage, we at NECA and Pro-Cal Lighting are taking advantage of all the platforms offered to us; understanding that while we must develop our workforce we must also sustain our small businesses. Whether resources are well-established like those offered by the SBA, or the 70-year-old NECA/IBEW apprenticeship, or if business owners create them themselves, we remain optimistic that the skills gap and workforce shortage can be bridged, all while advancing small businesses.

### **BENEFITS OF THIS LEGISLATION**

We at NECA and Pro-Cal Lighting were pleased to learn about the bipartisan legislation of last Congress extending the classification calculation time period for average receipts from three to five years. We again were elated to be asked to participate in this hearing seeking to further clarify, strengthen, and elaborate on that legislation. As a small business owner, keeping up with regulatory and legislative changes is extremely time consuming. By allowing a longer determination period, companies like mine will be granted the time to properly anticipate their cash flow and the effects of risk on their individual classifications.

This legislation is of particular benefit to companies like my own who can say that a five-year period given the measure of our current anticipated revenues for this year and the following, Pro-Cal Lighting would still hold its certification as a small business. If the same were to be evaluated over a three-year period, we would lose our certification after the year 2020. If we were to engage in discovering projects with the Federal Government, by the time the projects were funded and released for 8(a) qualified contractors we would be disqualified from participating and lose all that investment in developing and promoting this work. Instead, upon the passing of this legislation, Pro-Cal Lighting can begin to acquire new clients on long-term contracts, becoming long lasting revenue sources and subsequently moving our company into a safer financial position.

With nearly 80 percent of NECA's contractor-members able to be classified as small businesses, legislation like this allowing our contractors to utilize the small business classification for any additional length of time is of the utmost importance. Helping create small business is a great endeavor, but helping a small business grow and sustain its growth is what this nation needs to reflect a healthy economy. This legislation will positively affect thousands of small businesses across the country.

## **FURTHER LEGISLATIVE PROPOSALS**

### ***REGIONAL CALCULATION FOR SMALL BUSINESS CLASSIFICATION:***

There is no doubt that the small business classification is a beneficial tool for companies to gain a foothold in the industry allowing our business to compete and succeed in a competitive industry. That said, it should come as no surprise to this subcommittee that there are shortcomings to the structure, namely its one-size fits all approach.

By basing the classification off of annual receipts and extending that time period to five years, Congress has shown its understanding that current market realities must be taken into account when working to serve the small businesses that make up over 90 percent of this nation's economy. The next market reality to be addressed arises from the basic concept that the cost of doing business in one locale of the country can be drastically different from another. As a contractor in a high cost area, simple math makes me more likely to graduate out of the small business classification well before a contractor in a lower cost area. For instance, the annual average receipts of \$35 million in Illinois, amounts to around \$31 million in California, and over \$40 million in Mississippi. The differences in these sums equates to the reduction in small businesses classification benefits from high cost areas to low ones.

Although it may not be a perfect science, accounting for these variances is something that can be responsibly addressed by Congress. By taking the small business classification of annual average receipts over five years and tying this amount to a regionally adjusted sum then joined to inflation, Congress will be able to give each business its intended benefit from the program.

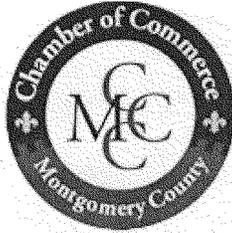
## **CONCLUSION**

As a small business contractor, I am extremely encouraged by this committee's efforts to revise and strengthen the Small Business Runway Extension Act. The further clarification and phase-in period of this legislation will be a key component in small business owners like myself mitigating the inherent risks of competing in our industry. The small business classification has been an integral part to our success as a business and has offered invaluable industry resources to our team. In addition, as contractors at NECA continue to address the workforce shortage nationwide, we urge this subcommittee to continue its recognition of the apprenticeship system as a critical tool in educating our nation's men and women.

This legislation will aid the nearly 3,200 NECA small business contractors in their quest to solidify their business for the long-term. As one of those contractors, Pro-Cal Lighting will immediately benefit and in doing so will pass down those benefits to a new, diverse generation of workers. While the legislation offered by this committee is a step forward, there are many more opportunities to come; namely the regionally adjusting of the average annual amount classifying a business as "small." We at NECA and Pro-Cal Lighting see this as an immediate and beneficial areas of action by this subcommittee.

Thank you for the opportunity to testify at this very important hearing. NECA applauds the subcommittee's unwavering efforts to reexamine the benefits of government programs for

small businesses. We are optimistic that this subcommittee remains capable to address the many challenges facing our nation's small business and look forward to working with you all to make those changes in a responsible and swift fashion.



Written Testimony of

Erin Allen  
President of Contemporaries, Inc.

On Behalf of  
Montgomery County Chamber of Commerce (MCCC)

Before the  
House Committee on Small Business Subcommittee on Contracting  
and Infrastructure

“Cleared for Takeoff? Implementation of the Small Business  
Runway Extension Act”

March 26, 2019

Good morning Chair Golden and Ranking Member Stauber. I want to thank you for the opportunity to testify on this important topic. My name is Erin Allen, President of Contemporaries, Inc. I am testifying today on behalf of the 500-member Montgomery County, Maryland, Chamber of Commerce (MCCC) and am a member of its Board of Directors and co-Chair of the Chamber's small business committee.

I am here for two reasons: first, to thank this Committee for working with us to pass the Runway Extension Act last year and second, to press for expedited implementation of this important law which affects businesses, like mine, nationwide.

As background, an important part of the Chamber is its GovConNet Council, which is comprised of industry procurement experts. The Council meets monthly to tackle federal contracting issues that affect small and midsize firms. Large companies are also an important part of the Chamber membership and they support efforts to assist small and midsize companies to obtain success in federal contracting.

Two years ago, the GovConNet Council identified a problem with respect to small businesses who were exceeding their size standard quickly. As small businesses and government contracts become larger, it is inevitable that they will face choices – grow beyond the small business programs to compete with large companies, stay small to avoid the difficulties of competing in a “full and open” environment, sell, or go out of business. Unfortunately, it appears that more and more firms are being forced to make those latter choices — stay small, sell, or go out of business.

These midsize businesses, of whom there are only 1,700 doing federal contracting work, compete not only with very large businesses, but also small businesses who receive set aside

federal work.<sup>1</sup> The Council recommended to Congress and this Committee that a path forward would be to allow small businesses to take into account a 5-year lookback with respect to revenues rather than the current three years. This is a relatively modest change, but an important one—at least to the many companies nationwide who have contacted us to express their gratitude for the change.

Before I go any further, let me just take a minute to give you the story of Contemporaries and why this issue is important to me. I am a second generation business owner – my parents started this business in 1991, providing administrative and clerical support to federal agencies, local universities, and a multitude of private sector companies. When I was tapped as President, our business had just under \$4 million in sales. Fifteen years later, we are one of the largest providers of staffing services to the National Institute of Health (NIH). Federal contracts constitute the majority of our revenue. In the D.C. metro, we are ranked as one of the top ten vendors under the GSA Federal Supply Schedule for Schedule 736. As a result of that steady growth, we find ourselves at the top of our size standard, which is revenue based.

Our size standard is \$7.5 million, a very small business for our industry, when compared to the large companies that sell these services to the federal government. My concern comes from having the time to accommodate future growth in a steady manner. The last three years have been good for our business. But the downside is that I risk losing that momentum, should I continue that growth or be awarded a large contract. If the Runway Extension Act goes into effect, I will have a few more critical years to build my infrastructure, develop talent, and comply with the costly new cyber security requirements the federal government is putting into place for its

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<sup>1</sup> Bloomberg Government, The Mid-Tier Market 2018 Company Report (2018).

contractors. In the end, my goal is to grow the company, create new jobs and contribute to the economy.

Fellow MCCC member, Steve Ramaley, testified before this Committee in April of 2018 on this critical issue, outlining MCCC's recommendations, including changing the formula for small business eligibility to the lowest three of the last five years. The rationale behind this proposed change can be stated simply: competitiveness takes time to build. Revenue is not an indicator of present competitiveness; it is an indicator of future competitiveness. Bigger small businesses that are about to graduate from the set-aside world need time to recruit talented employees, develop their intellectual property and build infrastructure to compete at the next level. Having a good year (or even a couple of good years) does not mean that the company will continue to grow. Moving from the current three-year look-back, to a five-year lookback, would give firms more time to adjust to the full-and-open marketplace. Furthermore, firms that show consistent high revenues would still be graduated. In addition, another member of MCCC, Lisa Firestone, testified on behalf of Women Impacting Public Policy. Her testimony focused on the issue her business was facing—transitioning to a midsize company.

Small businesses face enormous infrastructure hurdles especially if they grow very quickly or win larger federal contracts with big task orders. Some refer to this as the Powerball effect, leaving businesses scrambling to stay ahead of the demands of their growth and simultaneously trying to compete on the open market. A firm like mine simply can't compete with the large federal contractors overnight. Government contractors experience a unique pattern in their growth which is causing this midsize crisis – or no man's land. Contractor growth can be mercurial, sometimes hovering in the single digits and then exploding over two or three years. This pattern of sudden growth is increasingly common because of the Government's more frequent use of large

indefinite delivery, indefinite quantity (IDIQ) contract vehicles, under which contractors can be awarded huge task orders. It is not unusual for a contractor to win a single award or task order that, on its own, bumps the contractor out of the small business program. As referenced earlier in my testimony, the SBA uses a three year average of revenues to determine program eligibility. So a company with historic revenues of \$15-\$20 million might win an \$80 million task order and be very quickly slingshotted out of the set-aside environment and into the full-and-open world. The Runway Extension Act was aptly named, as Congress understood that as planes became bigger and faster, runways had to be extended. As contracts become larger, small businesses need more time so that they don't crash land into full and open competition.

As we testified last year, not just big small and midsize companies benefit from the Small Business Runway Extension Act. Any small business that intends to grow will eventually benefit from these changes. Further, having more well-qualified firms under the revenue standards will increase the chance that solicitations will be set-aside, and therefore will give all small firms more opportunities to compete. Separately, large businesses benefit because it increases the pool of well-qualified subcontractors. A major complaint we hear from large primes is that by the time they find a great small partner, the work garnered from that relationship makes the partner large.

The Small Business Runway Extension Act, as passed by the last Congress, addresses these issues. Unlike MCCC's original proposal, which would have allowed companies to choose the lowest of 3 out of previous 5 years, the legislation simply changed the current 3-year revenue average to a 5-year average for purposes of determining size. The bill, signed into law on December 17, 2018, provided a collective sigh of relief for many small businesses all over the country.

We expected the change to be effective immediately. However, since its passage into law, the SBA has posed the argument that the size determination changes should not take effect immediately, as the agency should first be able to utilize the rulemaking process and seek public comment. This decision by the SBA puts business decisions in limbo. While the law says they can take a 5-year average, SBA's rulemaking delays the process putting businesses in a precarious spot. Should they plan on a 5-year revenue average if and when the SBA makes the change final. Or should they risk being bumped out of being small, reengineer their business plan only to be eligible again when the SBA acts?

During a Senate Small Business hearing last month, Administrator McMahon committed to Senator Cardin that the agency would start work on the rulemaking immediately. In that vein, we urge the Agency to expedite the process by issuing a final rule, thus cutting out months in the rulemaking process. According to the Federal Register, under the Administrative Procedures Act, an agency can issue a final rule without publishing a proposed rule when, among other things, "where an agency has no discretion to propose a rule because Congress has already directed a specific regulatory outcome into law."<sup>2</sup> We believe that there was no question as to the intent of the Congress—there was a hearing, a markup, a clear Congressional record, and specific statutory language leaving no discretion with respect to the regulatory outcome. The law amended the Small Business Act by replacing "3 years" with "5 years". Together with the Congressional record, SBA is left with no discretion to deviate from a 5-year period of measurement.

While it seems unnecessary for the Congress to reiterate its intent that the legislation passed be implemented by issuing new legislation, we support any effort to insist on implementation.

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<sup>2</sup> A Guide to the Federal Rulemaking Process, Office of the Federal Register, available at [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (2011).

Agency delay is not unfamiliar to us – the SBA took 11 years to implement the women’s procurement program (8m) of the Small Business Act. This committee is within its right to insist on expedited action. At the end of the day, regardless of the method of implementation, the Small Business Runway Extension Act is an important first step toward assisting successful small businesses to grow. The damage caused by the delay is being felt by small businesses all over the country, not just inside the beltway. The longer implementation takes, the more uncertainty and confusion results for small business owners.

Thank you for the opportunity to testify and I look forward to answering any questions you may have.

**Response to Questions for the Record**

**Mr. David S. Black  
Government Contracts Attorney, Holland & Knight LLP**

**At the Hearing Entitled**

**"Cleared for Take-off?  
Implementation of the Small Business Runway Extension Act"**

**Submitted on April 9, 2019**

**Before the  
House Committee on Small Business,  
Subcommittee on Contracting and Infrastructure**

Thank you Chairman Golden, Ranking Member Stauber and Members of the Subcommittee for the opportunity to respond to the following "Questions for the Record" sent to me on March 29, 2019, as a follow up to my appearance at the above-referenced hearing on March 26, 2019.

**Question for the Record No. 1: Given the SBA's decision to go through the rulemaking process to implement SBREA, what are your thoughts on SBA's position that the public should have an opportunity to provide comment before changes are made?**

The December 2018 effective date of SBREA does not prevent SBA from undertaking a notice and comment process before finalizing the update to its regulation at 13 C.F.R. 121.104(c) as an interim rule. Moreover, as explained in response to Question No. 2, *during the time between the SBREA's effective date and SBA's issuance of an interim or final rule*, contractors and Federal agencies may rely on SBREA's minimum five-year standard in determining small business eligibility.

**A. SBA is Required to Provide an Opportunity for Public Notice and Comment, and the Immediate Effectiveness of the SBREA does Not Preclude Such Rulemaking.**

Section 3(a)(2)(C) of the Small Business Act requires SBA and any other Federal agency prescribing size standards to do so "after an opportunity for public notice and

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comment." 15 U.S.C. § 632(a)(2)(C)(i). Section 3(a)(2)(C) establishes certain minimum parameters for size standards required by Congress, and beyond which SBA and Federal agencies have no discretion to regulate. 15 U.S.C. § 632(a)(2)(C)(ii). One of these mandatory parameters for size standards imposed on Federal agencies is the minimum time for measuring size based on average annual receipts, which the SBREA changed from "not less than 3 years" to "not less than 5 years." 15 U.S.C. §632(a)(2)(C)(ii)(II).

**B. Because SBA Has No Discretion to Prescribe a Size Standard with a Measurement Period of "less than 5 years," SBA May (and Should) Issue its SBREA Regulations as an Interim Rule with Immediate Effectiveness.**

Although SBA must undertake public and notice comment when issuing regulations prescribing its size standards, the Administrative Procedure Act (APA) provides SBA with a range of options, including one with a faster track. It is well established that the APA permits agencies to finalize some rules without first publishing a proposed rule in the Federal Register in cases where the agency has "good cause" to find that the notice-and-comment process would be "impracticable, *unnecessary*, or contrary to the public interest." 5 U.S.C. § 553(b). Situation where an agency may issue an "interim rule" with immediate effectiveness include minor technical amendments and corrections where there is no substantive issue and some instances where an agency has no discretion to propose a rule because Congress has already directed a specific regulatory outcome in a law. *See id.*

In the case of the SBREA, it is not difficult for SBA to conclude that "good cause" exists to issue an interim rule. If SBA decides, as expected, to adopt Congress' "mandatory minimum" look-back period of five years (rather than some longer period), then public comment on its amended regulation as a "proposed rule" is clearly unnecessary.

Given the very limited statutory change made by the SBREA, SBA has no discretion to propose a look-back period of less than five years. Therefore, it is highly likely that SBA will simply update 13 C.F.R. 121.104(c) as follows:

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(1) Annual receipts of a concern that has been in business for ~~five~~ three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by ~~five~~ three.

(2) Annual receipts of a concern which has been in business for less than ~~five~~ three completed fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Where a concern has been in business ~~five~~ three or more complete fiscal years but has a short year as one of the years within its performance measurement, annual receipts means the total receipts for the short year and the ~~four~~ two full fiscal years divided by the total number of weeks in the short year and the ~~four~~ two full fiscal years, multiplied by 52.

Congress literally changed only one number in 15 U.S.C. § 632(a)(2)(C) – it changed “~~3~~ years” to “5 years” in § 632(a)(2)(C)(ii)(II). As demonstrated above, updating SBA’s regulations at 13 C.F.R. 121.104(c) to reflect the statutory change Congress made in the SBREA *should be just as simple* – swapping out the old references to “three” fiscal years with references to “five” fiscal years – with no real value expected from the public comment process. Because SBA has no discretion to propose a look-back period less than five years, it is not necessary to consider public comments on a shorter time-period, and SBA would likely be found to have “good cause” to issue its amendments to 13 C.F.R. 121.104(c) as an “interim rule” with immediate effectiveness.

The only possible exception is a scenario where SBA would propose a look-back period of longer than five years. As amended by the SBREA, Section 3(a)(2)(C) of the Small Business Act gives Federal agencies (including SBA) discretion to prescribe size

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standards for business provided that the size standard for concerns performing services is "on the basis of the annual average gross receipts of the business concern over a period of ***not less than*** 5 years." (Emphasis added.) Thus, in theory, SBA could issue a proposed rule proposing a size standard that is ***longer than*** 5 years. In a case that SBA elected to amend its regulations to prescribe a look-back period that is longer than Congress' mandatory minimum set forth in the SBREA, then there could, in theory, be some value in receiving public comments.

However, such a scenario is nothing more than a hypothetical exercise. Historically, SBA has never established a look-back period for services contractors that has exceeded the mandatory minimum established by Congress in Section 3(a)(2)(C) of the Small Business Act. While I have not spoken to anyone at SBA, in its public utterances on the implementation of the SBREA, I have not heard SBA indicate that it is interested in establishing a lookback period that is longer than five years. Provided that SBA intends to stick with the Congressional mandatory minimum of a five-year look-back period, there is no value in considering public comments. SBA has no discretion to prescribe a look-back period shorter than the five-year period established by Congress in the SBREA.

Again, the immediate effective date of the SBREA in December 2018 does not preclude SBA from undertaking a rulemaking process that includes an interim rule to "catch up" its regulations to the SBREA and an opportunity for public comment. As the Office of the Federal Register has explained in its "*Guide to the Rulemaking Process*,"<sup>1</sup>

When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an "interim final rule," or "interim rule." This type of rule becomes effective immediately upon publication. ***In most cases, the agency stipulates that it***

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<sup>1</sup> The Office of the Federal Register's *Guide to the Rulemaking Process* is available at [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (visited on April 8, 2019).

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*will alter the interim rule if warranted by public comments.* If the agency decides not to make changes to the interim rule, it generally will publish a brief final rule in the Federal Register confirming that decision.

(Emphasis added.)

**Question for Record No. 2: In your written testimony, you mention that small businesses are already enjoying the benefits of the Runway Extension Act. Can you specify how small businesses are already enjoying such benefits given that the SBA, in their Information Notice, alleges that the Runway Extension Act is not currently effective?**

As set forth below, businesses who are “small” under the SBREA’s new five-year look-back period are benefitting from the SBREA’s December 2018 effective date by submitting offers for new set-aside contracts in reliance on the statutory changes made by the SBREA and the invalidating effect this had on the three-year measurement period in SBA’s conflicting size regulations.<sup>2</sup> Because SBA’s conflicting regulations are rendered immediately invalid and Contracting Officers have broad discretion in procurement matters, it is reasonable and therefore legally permissible for Contracting Officers to accept size representations based on Congress’ new mandatory minimum look-back period of five years while SBA finalizes its regulations. **In short, during the**

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<sup>2</sup> As a point of practice, offerors relying on the SBREA’s five-year look-back standard to qualify as a small business may include a written representation in each particular proposal. In the event the written representation in the proposal under the five-year standard conflicts with a size representation in the System for Award Management (SAM) based on the three-year standard, the offeror can state that the written representation in its proposal governs the procurement, notwithstanding the out-of-date representation in SAM.

Because this practice is available to offerors and agencies, it is not necessary to update the System for Award Management (SAM) in order for contractors to utilize the amendments to the Small Business Acts size standards established by Congress. SAM provides administrative convenience for contractors and agencies, but it is not the exclusive method by which a contractor may represent its size to a Federal agency. Instead, before SAM is updated to accommodate size standards based upon the five-year period of measurement or a hybrid standard, contractors may represent their size directly in their proposals that include price, pursuant to 13 C.F.R. 121.404.

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***time between the SBREA's effective date and SBA's issuance of an interim or final rule, contractors and Federal agencies may rely on SBREA's minimum five-year standard in determining small business eligibility.***

**A. The Interplay Between the SBREA and the Procedures for Representing as an Eligible Small Business.**

By enacting the SBREA, Congress intended to help emerging small businesses who are not eligible for small business set-aside contracts under the three-year look-back period but are eligible under a five-year look-back period. Since December 17, 2018, these small business have been enjoying the benefits of the SBREA by submitting offers for set-aside contracts and representing that they are "small" under the applicable size standard using the five-year period of measuring average annual receipts.

Small business size eligibility for a set-aside contract is determined "as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation, which includes price." 13 C.F.R. § 121.404(a). Size eligibility for subcontracts set-aside for small businesses under a Federal prime contract are determined "as of the date of the offer for the subcontract." 13 C.F.R. § 121.3(C)(1)(v). "A concern that represents itself as a small business and qualifies as small at the time of its initial offer (or other formal response to a solicitation), which includes price, ***is considered to be a small business throughout the life of the contract.***" 13 C.F.R. § 121.404(g) (emphasis added).<sup>3</sup>

Based on the foregoing rules for determining eligibility for small business contracts and subcontracts, a small business ***who is submits an initial offer for a set-aside contract or subcontract after December 17, 2018***, that includes a representation that it is small under the new five-year look-back period of measurement established by the SBREA is eligible to receive award. Furthermore, the company will be considered to be

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<sup>3</sup> In certain circumstances, such as the exercise of an option period under contracts with durations of more than five years and within 30 days of an assignment of a contract or a merger or acquisition of a contractor, the contractor is required to re-certify its size to a contracting officer. See, e.g., 13 C.F.R. § 121.404(g).

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a small business "throughout the life of the contract." In this way, mid-tier businesses who are small under the five-year look-back standard are enjoying the benefits of the SBREA.

**B. Under Applicable APA Standards of Review, a Federal Agency Will Likely Be Deemed to Have Reasonable Exercised its Discretion to Accept Size Representations Based on the SBREA's Mandatory Minimum Look-Back Period of Five Years.**

Such contract awards are likely to survive a protest by a disappointed offeror alleging that it was improper for a contracting officer to accept a size representation based on the SBREA's five-year standard. Contracting officers at Federal agencies are within their broad discretion to accept size representations based on the new five-year look-back period authorized by the SBREA *even before* SBA issues interim or final rule to update its regulations. As explained in my original written testimony, SBREA took immediate effect on the date of enactment – December 17, 2018 – and *immediately invalidated* the conflicting "three-year" standard for computing average annual gross receipts of service contractors in SBA's regulations:

- **Congress was clear that the SBREA is effective *immediately*.** The SBREA directly amended the Small Business Act without providing that effectiveness would be delayed until rulemaking was completed. Although no effective date is specified, under established principles of statutory construction, "the omission of an express effective date simply indicates that, *absent clear congressional direction, it takes effect on its enactment date.*" *Johnson v. United States*, 529 U.S. 694, 695 (2000) (emphasis added).
- **The three-year standard in SBA's current regulations (13 C.F.R. § 121.104(c)) was invalidated by the conflict with the amended Small Business Act, under well-established principles of administrative law.** See, e.g., *Farrell v. United States*, 313 F.3d 1214, 1219 (9th Cir. 2002) ("It is well-settled that when a regulation conflicts with a subsequently enacted statute, the statute controls and voids the regulation."); *Scofield v. Lewis*, 251 F.2d 128, 132

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(5th Cir. 1958) (“A regulation, valid when promulgated, becomes invalid upon the enactment of a statute in conflict with the regulation.”); *see also Kievenaar v. Office of Personnel Management*, 421 F.3d 1359, 1364-65 (Fed. Cir. 2005) (holding that a regulation that conflicts with a subsequently amended statute is ineffective).

Thus, a court reviewing either the contracting officer’s or SBA’s application of the SBREA to an offer submitted after December 17, 2018, but before SBA issues its interim or final regulations would likely conclude it would not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (which is the applicable standard of judicial review) for a contracting officer to accept a size representation based on the SBREA’s mandatory minimum five-year standard. While SBA has discretion under § 3(a)(2)(C) of the Small Business Act to establish a look-back period longer than five years, *under no circumstances does it have legal discretion to prescribe a measurement period of less than five years*. After the SBREA became effective on December 17, 2018, the Small Business Act is clear that any Federal agency (including SBA) prescribing a size standard for service companies must provide a measurement period for average annual receipts “**of not less than 5 years**.” 15 U.S.C. § 632(a)(2)(C)(ii)(II) (emphasis added). Thus, given the preemptive effect of the SBREA on the three-year look-back standard in SBA’s regulations and the absence of discretion of SBA to establish a replacement standard that is less than 5 years, it is well within the discretion of contracting officer’s to award contracts to companies who represented themselves as “small” under the SBREA’s five-year look-back standard after the law went into effect on December 17, 2018.

**C. SBA’s Explanation of Why Its Three-Year Standard Remains in Effect Provided in SBA’s internal Information Notice Is “Not In Accordance With Law” and Will Likely be Found Unjustified Under APA Review.**

SBA’s internal “Information Notice” does not change this legal reality. The Information Notice offers only one reason why its three-year standard allegedly remains in effect – Congress’s refusal to establish an “express” effective date in the SBREA:

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SBA is receiving inquiries about whether the Runway Extension Act is effective immediately—that is, whether businesses can report their size today based on annual average receipts over five years instead of annual average receipts over three years. The Small Business Act still requires that new size standards be approved by the Administrator through a rulemaking process. **The Runway Extension Act does not include an effective date, and the amended section 3(a)(2)(C)(ii)(II) does not make a five-year average effective immediately.**

**The change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process.** The Office of Government Contracting and Business Development (GCBD) is drafting revisions to SBA's regulations and SBA's forms to implement the Runway Extension Act. Until SBA changes its regulations, businesses still must report their receipts based on a three-year average.

(emphasis added.) As noted above, the SBA's analysis and conclusion are plainly wrong and are likewise squarely refuted by longstanding principles of statutory construction applied by the United States Supreme Court ("Supreme Court"). The absence of an express effective date does not mean that the SBREA's effectiveness is suspended indefinitely. To the contrary, it means that SBREA took **immediate effect on December 17, 2018**. As the Supreme Court has explained, "the omission of an express effective date simply indicates that, absent clear congressional direction, **it takes effect on its enactment date.**" *Johnson*, 529 U.S. at 694-95 (citing *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)) (emphasis added). Because the Information Notice articulates a position that is clearly "arbitrary and capricious" and

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“otherwise not in accordance with law,” **it is entitled to no judicial deference** even though SBA is the agency designated by Congress to implement the Small Business Act.

Although not mentioned by SBA in its internal Information Notice, representatives of SBA have offered an additionally faulty reason regarding why it believes the SBREA does not invalidate any of the SBA’s regulations. The SBA takes the view that it is exempt from the small business size standard “requirements” of 15 U.S.C. § 632(a)(2)(C), including the standard for computing average annual gross receipts for service companies. As explained in Section IV of my original written testimony submitted to the Subcommittee, the SBA’s view is based on a plainly erroneous reading of the statutory text and is contrary of congressional intent to establish size standard requirements for all “federal agencies”— including the SBA.

**Question for Record No. 3: During the hearing, one of your recommendations was to issue a clarifying amendment to Section 3(a)(2)(C), specifying that the SBA Administrator is subject to that section.**

- a. Even if a clarifying amendment was issued, would the SBA be statutorily bound to go through the rulemaking process due to the requirement in section 3(a)(2)(C)(i)?**

As explained above in response to Question No. 1, a clarifying amendment would still require SBA to amend its regulations to “catch up” with the SBREA, including providing “an opportunity for public notice and comment” in accordance with 15 U.S.C. § 632(a)(2)(C)(i). But SBA would have good cause to issue an interim rule because it has no discretion to prescribe a measurement period of less than five years and it has no intention of prescribing a longer period.

*But, as explained in response to Question No. 2, the fact that SBA is required to undergo a rulemaking process **does not preclude** mid-tier contractors from submitting proposals in reliance on the SBREA’s mandatory minimum five-year standard or*

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*contracting officers from awarding set-aside contracts in reliance on them before SBA has issued its interim or final rule.* As explained above in response to Question No. 2, mid-tier contractors who are small under the SBREA's five-year look-back standard are eligible to submit offers after the SBREA's effective date of December 17, 2018, and contracting officers are within their discretion to rely on such representations when awarding small business set-aside contract. Under well-established principles of administrative law, the three-year standard in SBA's current regulations (13 C.F.R. § 121.104(c)) was *immediately invalidated* by the conflict with the Small Business Act, as amended by the SBREA on December 17, 2018. Based on SBA's rules for determining eligibility for small business contracts, a small business who submits an initial offer for a set-aside contract after December 17, 2018, that includes a representation that it is small under the new five-year look-back period of measurement established by the SBREA is eligible to receive award and will be considered to be a small business "throughout the life of the contract." As explained above, a contracting officer would act "reasonably" within his or her "broad discretion" to rely on such a size representation when awarding a set-aside contract.

**Question for Record No. 4: If Congress were to proceed with a transition period where the 3 and 5-year formula would both apply:**

- **How much time do you believe it would take the SBA to implement such transition period, considering the current delay and that certain tools such as SAM would need to be updated accordingly?**

If Congress amends Section 3(a)(2)(C) of the Small Business Act so that a new "mandatory minimum" size standard includes a transition period where contractors may elect between a three-year or five-year measurement standard, Congress can draft this to have immediate effect that immediately invalidates SBA's conflicting size regulations. As noted above, Congress may ensure that such an enactment has immediate effect by either *not providing an effective date* or *providing expressly* that the act is effective upon its enactment. Once legally effective, it will immediately invalidate SBA's conflicting size

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regulations. Under the legal domino effect described above in response to Question No. 2, small business contractors who are small under the new hybrid look-back standards would be eligible to submit offers after the statute's effective date, and contracting officer's would be within their discretion to rely on such representations when awarding small business set-aside contract, even though SBA has not yet completed the rule making process.

Based on SBA's recent track record issuing amendments to its small business regulations in response to Congressional amendments of the Small Business Act, I estimate that SBA would require between 9 and 18 months to issue an interim rule and 18-36 months to issue a final rule. SBA could conceivably shorten these time periods if it was highly motivated and had cooperation from other Federal agencies who review drafts of its regulations, but past experience cautions against maintaining such an expectation.

It is not necessary to update the System for Award Management (SAM) in order for contractors to utilize the amendments to the Small Business Acts size standards established by Congress. SAM provides administrative convenience for contractors and agencies, but it is not the exclusive method by which a contractor may represent its size to a Federal agency. Instead, before SAM is updated to accommodate size standards based upon the five-year period of measurement or a hybrid standard, contractors may represent their size directly in their proposals that include price, pursuant to 13 C.F.R. 121.404.

- **Would this solution require a period of public comment or rulemaking on the SBA's part? Moreover, are there any legitimate arguments the SBA can use to say that it needs to go through the rulemaking process?**

As set forth above, SBA would have "good cause" to issue an "interim rule" that took immediate effect prior to consideration of public comments under the Administrative Procedure Act." If Congress amended the Small Business Act to change its measurement period from a "mandatory minimum" to a specific period of time – thereby

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depriving SBA of any discretion in the matter – then SBA could issue a “direct final rule” without requesting public comment.

**Question for the Record No. 5: Some small businesses have suggested that the employee-based formula used for certain industries should also be modified and recommend calculating average number of employees over more than 12 months. Does the employee-based formula accurately reflect what a small business is or does it provide leeway for bigger companies to be classified as small?**

I do not have supplemental information or commentary to add to my original written testimony on this topic. Any changes Congress may decide to make to the employee-based size standard should not modify or delay the December 2018 effective date of the SBREA.

**Question for the Record No. 6: Speaking generally of size standards, where can we as Congress make improvements?**

SAM is paternalistic and cumbersome, and can force unwary or inexperienced concerns into making inaccurate representations regarding size. SAM requests information about a concerns employees or receipts and then applies a formula to compute annual averages of receipts and monthly averages of employees. But SAM does not provide complete step-by-step guidance in accordance with SBA’s regulations regarding how to calculate “receipts” and “employees” and how to determine size when a small business concern is newer than the standard period of measurement. Furthermore, SAM provides incomplete guidance regarding what constitutes an “affiliate” and how to compute size that includes the employees or receipts of affiliates, as may be applicable. Congress should clarify that size representations in SAM should be entered manually by the contractor *at the NAICS Code level* without relying on inputs regarding employees and revenue.

Beyond the foregoing, I do not have supplemental information or commentary to add to my original written testimony on this topic. Any changes Congress may decide to make

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to the small business size standards should not modify or delay the December 2018 effective date of the SBREA.



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April 3, 2019

**VIA EMAIL (lauren.finks@mail.house.gov)**

Lauren Finks  
Clerk  
House Committee on Small Business  
2361 Rayburn House Office Building  
Washington, DC 20515

Re: Response to Questions of the House Committee on Small Business

Dear Ms. Finks:

In response to the request of the House Committee on Small Business, below please find my responses to the Committee's questions for inclusion in the hearing record.

1. **Given the SBA's decision to go through the rulemaking process to implement SBREA, what are your thoughts on SBA's position that the public should have an opportunity to provide comment before changes are made?**

The U.S. Small Business Administration ("SBA") could issue an interim final rule, changing the receipts calculation from three years to five years, and seek public comment on the change and other impacts it has on the regulations. SBA could do this as an interim final rule, with regard to the years, and as a proposed rule to any other ancillary changes SBA believes are necessary, and seek comment to same.

2. **If Congress were to proceed with a transition period where the 3 and 5-year formula would both apply:**

- a. **How long do you think this transition period should be?**

We propose that the transition be at least two years, representing the change in the two formulas, in order to allow small businesses to adjust to the change.



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- b. How much time do you believe it would take the SBA to implement such transition period, considering the current delay and that certain tools such as SAM would need to be updated accordingly?**

SBA could implement a transition period immediately with an interim final rule (and seek public comment to same). As far as the System for Award Management (“SAM”), offerors also submit representations and certifications with their proposals for set-aside prime contracts, so SBA’s interim final rule could provide that, until SAM is updated, an offeror’s representations and certifications in its proposal will control over the representations and certifications the offeror makes in SAM.

- c. Would this solution require a period of public comment or rulemaking on the SBA’s part? Moreover, are there any legitimate arguments the SBA can use to say that it needs to go through the rulemaking process?**

If the transition period is statutorily directed by Congress, it is difficult to foresee any reasonable basis for public comment or rulemaking on SBA’s part. However, if the transition period is not directed by Congress, SBA could propose a transition period on its own, in implementing the Small Business Runway Extension Act of 2018 (“SBREA”), in which case SBA reasonably could argue that this proposal would need to be subject to public comment.

- d. Are there any implementation issues that we haven’t yet considered if Congress decides to move forward with this approach?**

While we do not believe this is an implementation issue for Congress, SBA will need to modify its forms—most notably, SBA Form 355—that request information related to a firm’s receipts calculation

- 3. During the hearing, one of the recommendations presented was to issue a clarifying amendment to Section 3(a)(2)(C), specifying that the SBA Administrator is subject to that section.**

- a. Even if a clarifying amendment was issued, would the SBA be statutorily bound to go through the rulemaking process due to the requirement in section 3(a)(2)(C)(i)?**

No, SBA is not statutorily bound to go through rulemaking for this change under Section 3(a)(2)(C) because that Section addresses the rulemaking process for size standards. The SBREA makes a change in how receipts are to be calculated, but does not change size standards. Similarly, the proposed clarifying amendment does not address size standards (other than to make clear the SBA must follow a process that it already follows).



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4. **Some small businesses have suggested that the employee-based formula used for certain industries should also be modified and recommend calculating average number of employees over more than 12 months. Does the employee-based formula accurately reflect what a small business is or does it provide leeway for bigger companies to be classified as small?**

We believe a study as to whether the employee-based calculation period of measurement should be changed could be helpful; we have not heard anything from our clients on this point. The employee-based size standards are appropriate for the industries to which they apply (e.g., manufacturing, environmental remediation, and research & development) because the firms in those industries incur operating costs significantly higher than traditional service contractors. As a result, the values of contracts awarded to these firms are often higher, suggesting higher receipts for the firms, but the firms then pay out large percentages of those receipts to vendors, suppliers, and subcontractors. Accordingly, these firms may appear to have large receipts on paper, but not necessarily large profits in reality.

5. **Speaking generally of size standards, where can we as Congress make improvements?**

SBA should be required to revisit and reissue size standards more frequently. The Small Business Act requires SBA to go through this process every five years (see 15 U.S.C. § 632 note (2010)), but SBA is already two years behind that target for the current size standards. Plus, it takes SBA years to issue the size standards, so by the time SBA does so, they are based on stale data. SBA should revisit size standards in greater frequency based on more recent data. We question whether SBA has the resources and staff to develop and modify size standards to keep the size standards in line with the current economy. Therefore, Congress should insist that its laws be followed and reasonably provide SBA with the tools and resources it needs to do so.

Sincerely,

Megan C. Connor



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**Statement for the Record**  
**House Small Business Committee – Subcommittee on Contracting and**  
**Infrastructure Hearing**  
*Cleared for Take-off? Implementation of the Small Business Runway Extension Act*

2 April 2019

United States House of Representatives Committee on Small Business  
Subcommittee on Contracting and Infrastructure  
2361 Rayburn House Office Building  
Washington, DC 20515

Chairman Golden and Ranking Member Stauber:

We appreciate your convening of the hearing on March 26<sup>th</sup> to discuss the Small Business Runway Extension Act that was passed in December 2018. On behalf of all the employee-owners of EA Engineering, Science, and Technology, Inc., PBC (EA), we thank you for the opportunity to express our support for the Small Business Runway Extension Act, and hope that your Subcommittee will expand the legislation to include companies like EA that operate under employee-based size standards.

EA is a 100% employee-owned Public Benefit Corporation that provides environmental, compliance, natural resources, and infrastructure engineering and management solutions to a wide range of government and industrial clients. In business for more than 45 years, EA has earned an outstanding reputation for technical expertise, responsive service, and judicious use of client resources. Headquartered in Hunt Valley, Maryland, EA employs approximately 500 professionals through a network of 26 offices across the continental United States, as well as Alaska, Hawaii, and Guam.

EA qualifies as a small business in the Environmental Remediation Services sub-industry under NAICS Code 562910, which currently has a size standard of 750 employees, measured on a trailing 12-month basis. At our current rate of growth, we anticipate that we could exceed the 750-employee threshold in the next two to three years. This concern has limited our strategic planning, and our ability to expand and hire additional employees.

**We strongly support the Runway Extension Act, and urge the Subcommittee to consider expanding it to apply to employee-based size standards.**

We applaud the Subcommittee's efforts in addressing the delay in implementing the Small Business Runway Extension Act. Overall, we think this legislation goes a long way in providing a planning pathway for small businesses that want to grow and graduate from small business status in a position of strength. However, we believe the Subcommittee should also consider including employee-based size standards, along with receipts-based standards, in any further



modifications to the Small Business Runway Extension Act. Should the Subcommittee – and the Committee as a whole – wish to first fix the issues impacting the legislation’s implementation, we would then urge the Committee to advance legislation that would afford the same 5-year lookback to employee-based size standards like EA.

The expansion of the calculation period for employee-based size standards makes sense on many levels. First, there are 505 industries governed by employee-based standards, nearly as many as the 526 industries covered by receipts-based standards. Employee-based size standards therefore represent nearly half of the industries governed by SBA, and should therefore be considered in any revision to the rules for calculating size standards. Second, employee-based standards are even more sensitive to business variability than receipt-based standards, because they are currently calculated over a 12-month rolling average with a new headcount every month, versus a current three-year period for receipt-based standards calculated once per year. Third, a longer calculation period makes even more sense for employee-based standards because the hiring of employees usually precedes the earning of revenue in a typical business. Thus, when we hire a team of employees in anticipation of a contract or task order award, the impact to our headcount is immediate, while the revenue may follow months or years later.

**Allowing a longer “runway” to calculate our average headcount would give us much-needed insulation from headcount volatility, and time to adapt our business model, before graduating from small business status.**

As a small business, we are very concerned with ensuring our business has a successful pathway towards future success and growth. Our business planning cycles are typically done in 5-year windows, not year by year or month by month, which we are forced to consider under the current 12-month rolling average approach. Having a longer glidepath to count employee totals would allow EA, and businesses like ours, to plan, hire, and retain employees for the long-term, while developing our strategic path forward to graduate through sustained growth.

The current 12-month rolling average produces heightened degrees of volatility when we bring on new hires. This volatility is magnified because every employee we bring aboard essentially counts as 1/12 towards our rolling average. EA often engages in large environmental remediation projects which involve the hiring of short-term field staff and technicians, raising the risk that we could inadvertently exceed our size standard. Under a five-year lookback, that risk would be lessened, and we would be able to hire for projects and meet the needs of our clients with more flexibility. A longer average period would go a long way in ensuring our company can hire and retain quality people, while planning for our long-term growth and eventual graduation from small business status.

While the Small Business Committee and its Subcommittee on Contracting and Infrastructure continue to work on this issue, EA is available to be a helpful resource in any way possible. As the legislative process continues, we would like to be able to continue to voice our comments



and concerns surrounding additional changes that may be made to the Small Business Runway Extension Act.

Again, we appreciate your efforts to implement and improve the Small Business Runway Extension Act. Thank you for your time to hear our concerns surrounding this legislation and your concern for the success of America's small businesses.

Sincerely,

A handwritten signature in black ink that reads 'Ian D. MacFarlane'.

Ian D. MacFarlane  
President and Chief Executive Officer  
EA Engineering, Science, and Technology, Inc., PBC

IDM/pn

Statement of Dr. Richard Amos, President, COLSA Corporation, Huntsville, AL

Submitted to the U.S. House of Representatives Committee on Small Business on Tuesday  
March 26, 2019, Room 2360, Rayburn House Office Building

Hearing Entitled "Cleared for Take-off? Implementation of the Small Business Runway  
Extension Act"

Chairwoman Velázquez, Ranking Member Chabot and fellow members of the Committee,

Thank you for the opportunity to submit a written statement regarding the potential  
impact of implementing changes in determining the small business size under the North  
American Industrial Classification System (NAICS).

My name is Richard Amos, and I am the President of COLSA Corporation (COLSA),  
which is headquartered in Huntsville, Alabama. COLSA, as a Small Business, has supported the  
federal sector, especially the Department of Defense, for more than 35 years. We have  
consistently provided outstanding performance to our customers.

COLSA has significantly benefited from the small business programs and from the  
emphasis the Federal sector has on growing small businesses. COLSA appreciates the continued  
focus by this committee on providing opportunities for small businesses to grow and to  
contribute to our Nation's success.

Over the past decade the federal sector spend has substantially changed in services. In the  
Department of Defense, services that include R&D represent approximately 50% of the total  
spend, but the changes in revenue and employee size for small business identification have  
minimally increased.

The recent change to extend the rolling average to five years for the revenue-based NAICS  
codes in the Small Business Runway Extension Act of 2018 was an excellent step, and COLSA  
congratulates the committee on taking that step. However, the act failed to address employee-  
based NAICS determination for small business size determination.

The employee based NAICS code 541715, which supports research and development,  
represents a significant portion of the DoD services spend and includes the most technically  
challenging support services. The employee based NAICS codes only have a one year rolling  
average.

A one year rolling average simply results in companies that outgrow their size in one  
month, only to find themselves small again with the loss of one contract within a very short time

period. Additionally, especially in the defense industry, a company that grows to 1600 employees almost immediately finds itself competing in a market of companies with over 50,000 employees.

Just like the companies in the revenue-based NAICS, small businesses in the employee-based NAICS need time to grow and mature and develop a strategic path for success. It usually takes a company at least 5 years to grow and stabilize their business, regardless of the industry. A five year rolling average would allow for that stabilization and would provide small businesses in the federal sector with a steady growth plan.

COLSA encourages the committee to expand the act to include the employee based NAICS code. This change will prevent the "yo-yo" effect between size categories and strengthen the Nation's science and engineering base, as well as fuel small business growth. For the federal sector, that ensures adequate competition that will drive a competitive cost structure.

Congress has consistently recognized the criticality of ensuring the federal sector takes advantage of the latest technologies, provides the best equipment and services to our warfighters and continues to fuel the economy through small business growth. The Department of Defense, as well as the entire Federal Sector, recognize the challenge in incentivizing companies to create new technologies and to recruit and retain scientists and engineers that have a passion for innovation. Without additional changes in the size standards for the employee-based research and development NAICS, 541715, it will be difficult to maintain a stable base of small companies to help meet that critical need.

Thank you for the opportunity to submit a written statement on behalf of COLSA in support of a five year rolling average for employee based NAICS codes. Please do not hesitate to contact me if I can provide any additional information that could be helpful to the committee.

Respectfully submitted,



Dr. Richard Amos  
President, COLSA Corporation