Written Testimony of

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At the Hearing Entitled

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

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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 –

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

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

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).

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,

> 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

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).

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.

(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.

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),[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 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

[1] "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."

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).[2]

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

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

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.

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.

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.

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.[3] 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.

[3] 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

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

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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.