

SMALL BUSINESS SIZE STANDARD FLEXIBILITY ACT
OF 2011

NOVEMBER 16, 2011.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. GRAVES of Missouri, from the Committee on Small Business,
submitted the following,

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 585]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business, to whom was referred the bill (H.R. 585) to amend the Small Business Act to provide for the establishment and approval of small business concern size standards by the Chief Counsel for Advocacy of the Small Business Administration, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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I. PURPOSE AND BILL SUMMARY

The purpose of H.R. 585, the “Small Business Size Standard Flexibility Act of 2011,” is to amend the Small Business Act by transferring certain size standard determination functions from the Administrator of the Small Business Administration (SBA) to the Office of the Chief Counsel for Advocacy. Currently, the Administrator, pursuant to § 3(a)(2) of the Small Business Act (15 U.S.C. § 632(a)(2)), has the authority to determine what constitutes a small business for the purposes of the Small Business or any other Act. Should an agency wish to draft a regulation that adopts a size standard different from the one already adopted by the Administrator in regulations implementing the Small Business Act, the agency must obtain approval of the Administrator. However, that requires the Administrator to have a complete understanding of the regulatory regime of that other act—knowledge usually outside the expertise of the SBA. However, the Office of the Chief Counsel for Advocacy, an independent office within the SBA, represents the interests of small businesses in rulemaking proceedings (as part of its responsibility to monitor agency compliance with the Regulatory Flexibility Act, 5 U.S.C. §§ 601–12, (RFA)) does have such expertise. Therefore, it is logical to transfer the limited function on determining size standards of small businesses for purposes other than the Small Business Act and Small Business Investment Act of 1958 to the Office of the Chief Counsel for Advocacy.

II. NEED FOR LEGISLATION

The RFA allows a federal agency to consult with the Office of the Chief Counsel for Advocacy if it wishes to use a different size standard than the one adopted by the SBA in carrying out the agency’s analytical responsibilities under the RFA. However, if an agency then uses that alternative size standard for developing a final rule, it must obtain the approval of the SBA as set forth in § 3(a)(2) of the Small Business Act. H.R. 585, by transferring the authority in § 3(a)(2) to the Office of the Chief Counsel for Advocacy avoids the potential for inconsistent decisions in the federal government concerning size standards. Finally, the Office of the Chief Counsel for Advocacy has expertise, through its work in reviewing agency compliance with the RFA, to understand the context in which an agency is seeking to utilize a size standard different than that promulgated by the SBA.

III. HEARINGS

The Committee met on June 15, 2011 to receive testimony from outside experts on H.R. 585 at a hearing entitled “Lifting the Weight of Regulations: Growing Jobs by Reducing Regulatory Burdens.” The witnesses noted their support for H.R. 585 in an effort to avoid possibly inconsistent decisions about small business size standard.

H.R. 585 had been incorporated into previous versions of a broader bill dealing with amendments to the RFA. In committee hearings on those bills, full support was provided for the provision that is now H.R. 585.

IV. COMMITTEE CONSIDERATION

The Committee on Small Business met in open session, with a quorum being present, on July 13, 2011 and ordered H.R. 585 reported without amendment to the House by a recorded vote of 13 yeas to 8 noes at 4:07 p.m. During the markup, one amendment was offered by Ms. Velázquez (D-NY). The amendment would have prohibited the transfer of authority to the Chief Counsel unless the Chief Counsel certified the Office of Advocacy had the personnel and absorb the cost of such transfer. The amendment was not agreed to by a recorded vote of 11 yeas to 12 noes at 4:03 p.m.

V. COMMITTEE VOTES

AMENDMENT TO H.R. 585 OFFERED BY MS. VELÁZQUEZ OF
NEW YORK

Add, at the end of the bill, the following:

SEC. 3. EFFECTIVE DATE; STUDY AND CERTIFICATION REQUIRED REGARDING COST, RESOURCE DUPLICATION AND AGENCY WASTE.

This Act and the amendments made by this Act shall not take effect until the date that the Chief Counsel for Advocacy of the Small Business Administration—

(1) reports to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate on the feasibility, personnel resources required, and overall cost to the Chief Counsel of carrying out the responsibilities of the Chief Counsel under the amendments made in section 2, including an analysis of whether carrying out such responsibilities will result in a duplication of functions in the Small Business Administration, including those of the Office of Size Standards; and

(2) certifies to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate that the Chief Counsel may carry out the responsibilities of the Chief Counsel under the amendments made in section 2 without incurring any additional costs.

COMMITTEE ON SMALL BUSINESS

HR 585
 DATE: 7/13/2011
 ROLL CALL: 5
 AMENDMENT NUMBER: 1
 VOTE: 11 (AYE) 12 (NO)

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GRAVES, Chairman		X		
Dr. BARTLETT		X		
Mr. CHABOT		X		
Mr. KING		X		
Mr. COFFMAN		X		
Mr. MULVANEY		X		
Mr. TIPTON		X		
Mr. LANDRY		X		
Ms. HERRERA BEUTLER	X			
Mr. WEST	X			
Mrs. ELLMERS		X		
Mr. WALSH		X		
Mr. HANNA		X		
Mr. BARLETTA		X		
Ms. VELAZQUEZ, Ranking Member	X			
Mr. SCHRADER	X			
Mr. CRITZ	X			
Mr. ALTMIRE	X			
Ms. CLARK	X			
Ms. CHU				X
Mr. CICILLINE	X			
Mr. RICHMOND				X
Mr. PETERS	X			
Mr. OWENS	X			
Mr. KEATING	X			
TOTALS	11	12		2

COMMITTEE ON SMALL BUSINESS

HR 585
 DATE: 7/13/2011
 ROLL CALL: 6
 VOTE: 13 (AYE) 8 (NO)

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GRAVES, Chairman	X			
Dr. BARTLETT	X			
Mr. CHABOT	X			
Mr. KING	X			
Mr. COFFMAN	X			
Mr. MULVANEY	X			
Mr. TIPTON	X			
Mr. LANDRY	X			
Ms. HERRERA BEUTLER	X			
Mr. WEST				X
Mrs. ELLMERS	X			
Mr. WALSH	X			
Mr. HANNA	X			
Mr. BARLETTA	X			
Ms. VELAZQUEZ, Ranking Member		X		
Mr. SCHRADER		X		
Mr. CRITZ		X		
Mr. ALTMIRE				X
Ms. CLARK		X		
Ms. CHU				X
Mr. CICILLINE		X		
Mr. RICHMOND				X
Mr. PETERS		X		
Mr. OWENS		X		
Mr. KEATING		X		
TOTALS	13	8		4

VI. SECTION-BY-SECTION ANALYSIS OF H.R. 585

Section 1. Short title

Provides a short title for H.R. 585.

Section 2. Establishment and approval of small business concern size standards by the Chief Counsel for Advocacy

In 1992, Senators Dale Bumpers (D-AR) and Malcolm Wallop (R-WY) were incensed at actions taken by the Nuclear Regulatory Commission (NRC) to increase fees for byproduct users of fissile material under the Atomic Energy Act. The NRC did not perform an adequate assessment of these fee increases on small entities as required by the RFA. In establishing these fees, the NRC utilized a different set of definitions than had been set by the SBA under § 3 of the Small Business Act. Senators Bumpers and Wallop sponsored an amendment to the Small Business Act requiring that federal agencies wishing to adopt a definition of small business that varied from those promulgated by the Small Business Administration (SBA) pursuant to its § 3 authority must issue the new size standard for notice and comment and then obtain approval of the Administrator of the SBA.

While the Administrator has significant acumen in setting size standards, that expertise is limited to the use of size standards for purposes of the Small Business Act and Small Business Investment Act of 1958. As a result, the Administrator is not the proper official to determine size standards for purposes of other agencies' regulatory activities. The Administrator is not fluent with the vast array of federal regulatory programs, is not in constant communication with small entities that might be affected by another federal agency's regulatory regime, and does not have the analytical expertise to assess the regulatory impact of a particular size standard on small entities. Furthermore, the Administrator's standards are: very inclusive, not developed to comport with other agencies' regulatory regimes, and lack sufficient granularity to examine the impact of a proposed rule on a spectrum of small businesses. When other agencies have sought the approval of the Administrator under the amendments made to § 3 of the Small Business Act by Senators Bumpers and Wallop, the Office of Size Standards consulted with personnel in the Office of Advocacy on the rectitude of an agency's definition of small business that varied from those set forth in the SBA's regulations interpreting the Small Business Act.

Given this rationale, it is appropriate to split the size standard functions in the Small Business Act. Section 2 of H.R. 585 provides that the Administrator shall establish size standards to carry out the purposes of the Small Business Act or Small Business Investment Act of 1958. Section 2 then delegates the authority to approve a size standard for purposes of all other statutes to the Chief Counsel. The Chief Counsel is only entitled to rule on size standards for definitions of small business concerns if the agency issuing the regulation does not adopt a size standard approved by the Administrator for carrying out the purposes of the Small Business Act or Small Business Investment Act. This will constrain the number of size standard decisions by the Chief Counsel and allow agencies to utilize already established standards rather than have to go through the Chief Counsel for approval of each standard. If a fed-

eral agency adopts, as a definition of small business, a size standard approved by the Administrator, the federal agency need not seek approval of the Chief Counsel pursuant to §3 of the Small Business Act as amended by H.R. 585. The determination of a size standard for other regulatory purposes has no effect on the requirements of an agency that wishes to develop a definition of small business as set forth in §601(3) of the RFA. Thus, there are two different size standard approvals that the Chief Counsel may be forced to make: (1) the size determination for analyzing the proposed and final rule pursuant to the RFA; and (2) the definition of a small business that may be included in the text of the final rule.

Nothing in the legislation requires that the agency promulgating a regulation must utilize the size standards in its rules for purposes of complying with the RFA. However, it would be logical for the agency to explain the rationale for adopting different definitions in the statement of basis and purpose as well as any FRFA or certification. To be sure, an agency may use a different definition of small business for purposes of compliance with the RFA if the agency adopts the Administrator's definition of small business in the rule at issue.

An alternative to the approach taken in H.R. 585 would be for the Administrator to make all size standard determinations with the concurrence of the Chief Counsel on those size standards developed to implement statutes other than the Small Business Act or Small Business Investment Act. Adoption of that regulatory regime could lead to the anomalous result of the Chief Counsel and Administrator making different determinations on the same size standard. Under §601 of the RFA, the default size standard for agency compliance with the RFA are the ones adopted by the Administrator and set forth in Part 121 of Title 13, Code of Federal Regulations. However, the RFA permits the agency to utilize a different standard in complying with the RFA after consultation with the Chief Counsel for Advocacy. The agency then uses that standard for its initial and final regulatory flexibility analyses which results in the agency adopting a small business exemption identical to the definition of a small business in its regulatory flexibility analyses. Since that definition is different than the one adopted by the Administrator, the agency must seek the approval of the Administrator. If the Administrator disapproves that standard, then a small business exemption that the Chief Counsel and the agency thought was appropriate would not be put into effect.¹ H.R. 585 avoids these potentially anomalous results by vesting the Chief Counsel with the sole authority to make size decisions for the purposes of other regulatory programs.

Section 2(c) makes conforming changes in §3(a)(3). The Chief Counsel is added to ensure that size standards vary from industry to industry as is appropriate given the context of the rulemaking for which the Chief Counsel has been asked to approve a definition of small business.

The Chief Counsel's decision on size standards should be rational and subject to judicial review. Section 2(d) authorizing judicial re-

¹This could be particularly problematic if the size standard adopted by the agency with the concurrence of the Chief Counsel is larger than the size standard promulgated by the Administrator. The Administrator might feel such an expansion of the term "small business" inappropriate.

view eliminates litigation over whether Congress intended a private right of action under *Cort v. Ash*, 422 U.S. 66 (1975), or whether the decision was left to the discretion of the agency pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).

To be sure, the Office of Advocacy could be placed in the odd circumstance of being a respondent in an action in which it is defended by the Department of Justice while at the same time filing an amicus brief against the Department of Justice on whether the agency complied with the RFA. Given the fact, the Chief Counsel's "intervention" in the RFA compliance aspect of the case is as an amicus rather than as a party, the Committee does not believe the odd litigation stance will prove problematic to the court reviewing the case or the Department of Justice's defense of the Chief Counsel. The odd alignment of defendants and friends of the court should not complicate judicial review because courts often face challenges in which one party challenging an agency action may agree with the agency in opposition to a stance taken by another party challenging the same rules. Despite the potential alignment of interests, the Department of Justice should be able to fulfill its obligations to defend the Chief Counsel on the size standard decision² even though the Chief Counsel may be filing an amicus brief in opposition to the Justice Department's other agency defendant. Finally, given the nature of the claims and the record on review, the Department of Justice's defense of the action will reveal client confidences concerning the development of the rule to a "party" opposed to the rule.

Nothing in these changes made by H.R. 585 are designed to authorize a specific challenge to the size determination made by the agency and the Office of Advocacy pursuant to § 601(3). To the extent that a party believes that the size standard utilized in complying with the RFA was unreasonable, the adversely affected small entity may challenge the agency's compliance with the RFA as set forth in § 611.

The changes made in H.R. 585 will not represent a significant strain on the resources of the Office of the Chief Counsel for Advocacy. According to data from the SBA, there have been approximately 25 requests by other agencies under the authority of amended section 3 of the Small Business Act since the date of amendment in 1992. That works out to between one to two requests per year. Even that may be an overestimate since the vast majority of requests were made by the Federal Communications Commission to implement its authority to auction spectrum under § 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). Given that the number of such auctions will continue to diminish as the government runs out of spectrum to auction, the Office of the Chief Counsel for Advocacy should have sufficient resources to handle the authority transferred to it under this legislation.

VII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

H.R. 585 would amend the Small Business Act to require federal agencies obtain the approval of the Chief Counsel for Advocacy

² It is very unlikely that the Chief Counsel will condemn an agency's compliance with the RFA because of a size standard used in the regulation was approved by the Chief Counsel. That actually would be the height of irrational decisionmaking.

rather than the Administrator if they wish to use a definition of small business for the purposes of acts others than the Small Business Act or Small Business Investment Act of 1958. No additional authorities or transfers are made between the Administrator and the Chief Counsel for Advocacy under the bill.

Based on information from the Office of the Chief Counsel for Advocacy and other agencies, the Congressional Budget Office estimates that implementing H.R. 585 would cost \$6 million over the 2012–2016 period subject to appropriation of the necessary amounts. Pay-as-you go procedures do not apply to this legislation because it would not affect direct spending or revenues.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 27, 2011.

Hon. SAM GRAVES,
*Chairman, Committee on Small Business,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 585, the Small Business Size Standard Flexibility Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 585—Small Business Size Standard Flexibility Act of 2011

Summary: H.R. 585 would authorize the Chief Counsel for Advocacy within the Small Business Administration (SBA) to specify standards to be used by federal agencies to determine whether a business should be considered a small business under certain statutes. Currently, the Administrator of SBA sets size standards for purposes of implementing the Small Business Act and the Small Business Investment Act; the Administrator consults with the agency's Chief Counsel for Advocacy in determining size standards to be used by federal agencies in implementing other statutory provisions. H.R. 585 would split the duties, authorizing the Chief Counsel for Advocacy to determine and approve size standards for other federal regulatory agencies while retaining the Administrator's authority to set size standards for purposes of the Small Business Act and the Small Business Investment Act.

Based on information from the SBA, CBO estimates that implementing H.R. 585 would cost \$6 million over the 2012–2016 period, assuming appropriation of the necessary amounts. Enacting H.R. 585 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 585 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 585 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—					
	2012	2013	2014	2015	2016	2012–2016
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	*	1	2	2	2	7
Estimated Outlays	*	1	1	2	2	6

Note: * = less than \$500,000.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the end of 2011, the necessary amounts will be appropriated each year, and spending will follow historical patterns for similar activities.

Under current law, many statutes provide special considerations for small businesses. For example, small businesses enjoy set-asides in federal contracting policy and pay lower fees to apply for patents and trademarks. In order for the SBA and other agencies to determine eligibility for such special consideration, the SBA has established size standards that businesses must meet to be considered a small business.

In some cases, the underlying statute clearly defines the required characteristics of a small business; in other cases, however, statutes authorize the implementing agency to make those determinations. In the latter instance, an agency may use the SBA’s established size standards or may set a standard of its own, developed in consultation with SBA and the Chief Counsel for Advocacy at the SBA (an independent department within the agency) and approved by the SBA Administrator.

Under H.R. 585, the SBA would retain its authority to develop size standards for programs under the Small Business Act and the Small Business Investment Act, while the Chief Counsel for Advocacy would be authorized to specify size standards for agencies developing regulations under any other statute. Further, the Chief Counsel for Advocacy would approve the size standard selected by an agency if it deviated from SBA’s prescribed standards.

Based on information from the Chief Counsel for Advocacy and the SBA, CBO expects that the Office of Advocacy would ultimately need 10 additional staff positions to implement its new authority. Because the Office of Advocacy is an independent department within SBA, the office does not have access to SBA’s legal and administrative support services; therefore, the Office would need to develop that capacity separately. CBO assumes that most of the new positions would fill that need; the remaining positions would provide additional expertise in developing size standards. CBO estimates that implementing the provisions of H.R. 585 would cost \$6 million over the 2012–2016 period, assuming appropriation of the necessary amounts, mostly for salaries and expenses. Those costs are net of any savings in the SBA’s Office of Size Standards that would result from narrowing its authority.

Pay-As-You-Go considerations: None.

Intergovernmental and private-sector impact: H.R. 585 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Susan Willie; Impact on state, local, and tribal governments: Elizabeth Cove Delisle; Impact on the private sector: Amy Petz and Samuel Wice.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VIII. UNFUNDED MANDATES

H.R. 585 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, Pub. L. No. 104-4, and would impose no costs on state, local or tribal governments.

IX. NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House, the Committee provides the following opinion and estimate with respect to new budget authority, entitlement authority and tax expenditures.

The Committee does not adopt as its own the estimate of new budget authority contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to § 402 of the Congressional Budget Act of 1974.

The Committee believes that the Congressional Budget Office failed to comprehend the scope of the authority being transferred in this legislation from the Administrator to the Office of the Chief Counsel for Advocacy. Currently, an agency must obtain the approval of the Administrator if the agency wishes to use a definition of small business different than one developed by the Administrator. This authority has been used a total of 32 times by federal agencies (22 times by the Federal Communications Commission for the auctioning of spectrum pursuant to § 309(j) of the Federal Communication Act of 1934) since 1992. That is less than 2 approvals per year.

Under H.R. 585, it is only the authority that has been used 32 times in history that will be transferred to the Office of the Chief Counsel for Advocacy. The Committee does not believe that it will cost between \$1 and \$2 million per year for the Office of the Chief Counsel for Advocacy to make a determination on the one to two requests for size standards that it might receive in a given year. As a result, the Committee believes that the Office of the Chief Counsel for Advocacy can perform the transferred function within its current budget and requires no additional budgetary outlays. The bill does not contain any new entitlement authority, tax expenditures, or tax revenue.

X. OVERSIGHT FINDINGS

In accordance with clause 2(b)(1) of rule X of the Rules of the House, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 585 are incorporated into the descriptive portions of this report.

XI. STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the authority for this legislation in Art. I, § 8, cls. 1, 3, and 18.

XII. CONGRESSIONAL ACCOUNTABILITY ACT

H.R. 585 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of § 102(b)(3) of Pub. L. No. 104-1.

XIII. FEDERAL ADVISORY COMMITTEE ACT STATEMENT

H.R. 585 does not establish or authorize the establishment of any new advisory committees as that term is defined in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

XIV. STATEMENT OF NO EARMARKS

Pursuant to clause 9 of rule XXI, H.R. 585 does not contain any congressional earmarks, limited tax benefits or limited tariff benefits as defined in subsections (e), (f) or (g) of clause 9 of rule XXI of the Rules of the House.

XV. PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House, the Committee establishes the following performance related goals and objectives for this legislation:

H.R. 585 includes provisions designed to streamline the process of obtaining approval of size standards for the purposes of acts other than the Small Business Act and Small Business Investment Act of 1958.

XVI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SMALL BUSINESS ACT

* * * * *

SEC. 3. (a)(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.]

(A) IN GENERAL.—In addition to the criteria specified in paragraph (1)—

(i) the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for purposes of this Act or the Small Business Investment Act of 1958; and

(ii) the Chief Counsel for Advocacy may specify such definitions or standards for purposes of any other Act.

* * * * *

(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) * * *

* * * * *

[(iii) is approved by the Administrator.]

(iii) except in the case of a size standard prescribed by the Administrator, is approved by the Chief Counsel for Advocacy.

(3) When establishing or approving any size standard pursuant to paragraph (2), the Administrator or Chief Counsel for Advocacy, as appropriate shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the Administrator or Chief Counsel for Advocacy.

* * * * *

(6) JUDICIAL REVIEW OF STANDARDS APPROVED BY CHIEF COUNSEL.—*In the case of an action for judicial review of a rule which includes a definition or standard approved by the Chief Counsel for Advocacy under this subsection, the party seeking such review shall be entitled to join the Chief Counsel as a party in such action.*

* * * * *

XVII. DISSENTING VIEWS

H.R. 585—THE SMALL BUSINESS SIZE STANDARD FLEXIBILITY ACT OF 2011

Background

Under current law, the Small Business Administration (SBA) unambiguously approves size standards for all laws, including the Small Business Act and any other statute. With regard to the SBA, these standards are most notably used to determine eligibility for the agency's lending and contracting programs. For statutes unrelated to the SBA, size standards are used to determine eligibility for certain federal programs or in the application of certain other laws. To this point, the Small Business Act states that ". . . 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."¹

This responsibility is not legally altered although the Regulatory Flexibility Act contains language that permits agencies to consult with the Office of Advocacy regarding an alternative definition for "small business concern." The RFA states "the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."² By requiring that the Office of Advocacy only be consulted, and *not* approve an alternative definition for "small business concern," it is clear that the SBA retains full legal authority over size standard determinations.

As a result, the SBA's Office of Size Standards has served as the sole approval authority for determining size standards—for both the Small Business Act and all other statutes. When an agency is seeking to use a size standard other than those approved by the SBA, the agency may consult with the Office of Advocacy. Such consultation is sensible, as the Office of Advocacy has significant knowledge of the regulatory environment outside of the canon of SBA law. However, the SBA's Office of Size Standards, with its historical involvement, expertise, and staff resources in this area, remains the appropriate entity to approve such size standards.

¹ 15 U.S.C. § 632(a)(2)(A).

² 5 U.S.C. § 601(3).

Impact of Legislation

H.R. 585 rewrites 15 U.S.C. § 632(a)(2)(A) and effectively splits the approval of size standards between the SBA and the Office of Size Standards. Under the legislation, the SBA would establish size standards related to the Small Business Act and the Small Business Investment Act of 1958. It then delegates the authority to approve a size standard for purposes of all other statutes to the Office of Advocacy.

Creates bureaucratic duplication and confusion

While the legislation permits the SBA to continue to approve size standards for its enabling statutes, it removes SBA's authority to do so for other statutes. The result would be to create a duplicate size standard authority in both the SBA and the Office of Advocacy. Both the SBA and the Office of Advocacy would have personnel who would analyze and evaluate size standards. Through the bifurcation of these responsibilities, taxpayers would effectively be forgoing the economies of scale that are currently enjoyed by the operation of a single Office of Size Standards in the SBA.

Having two such entities that have the same mission is not a transfer of function, but an inefficient and duplicative reorganization. It was for these reasons that in 2004, Thomas Sullivan, the Chief Counsel of the Office of Advocacy under President George W. Bush testified before this committee saying that “[t]he SBA’s Office of Size Standards has the necessary expertise and resources to make appropriate decisions regarding industry size determinations, so I do not believe that that [this legislative change] will benefit small entities.”³

Having two entities duplicate size standards approvals will create bureaucratic confusion. In this regard Mr. Sullivan further testified “that vesting the authority to determine size standards to . . . Advocacy may cause confusion over which SBA office determines size standards.”⁴ He followed by saying that he did “not believe that the proposed [language] will benefit small entities.”⁵ Such concerns remain relevant today, as the duplication of size standard responsibilities will cause agencies and small firms to understand not only the minutiae of size standards but also the inner-working of SBA’s bureaucracy. Instead of having one central office, there will now be two—further muddling small businesses’ relationship with the federal government.

Such duplication also runs counter to the committee’s Views and Estimates on the SBA’s FY 2012 Budget Submission, which was approved by voice vote on March 15, 2011.⁶ In its Views and Estimates letter, the committee cites several instances of duplication in the agency’s programs and, as a result, requests that funds be ter-

³Hearing before the Committee on Small Business, U.S. House of Representatives, entitled “Improving the Regulatory Flexibility Act—H.R. 2345,” May 5, 2004, Washington, D.C.

⁴*Ibid.*

⁵*Ibid.*

⁶See “Entrepreneurial Development Programs” heading, specifically the subheading concerning the Women’s Business Center, Veterans Business Outreach Centers, and PRIME, and the Office of Native American Affairs in letter to Committee on the Budget regarding the Committee on Small Business’ Views and Estimates on the SBA’s FY 2012 Budget Submission. Letter can be found at http://smbiz.house.gov/UploadedFiles/March_17_Views_and_Estimates_Letter.pdf.

minated for such programs. Similarly, the enactment of H.R. 585 would create clear duplication within the SBA and the Office of Advocacy as both entities would be able to approve size standards.

Maintaining the current consultative relationship between the Office of Advocacy is more sensible. On this matter, Frank Swain, the Chief Counsel of the Office of Advocacy under President Ronald Reagan stated during the June 15, 2011 hearing on H.R. 585 with regard to the Office of Advocacy's role in size standard determinations "that . . . they ought to be consultative with the SBA Size Standards office. . . ." ⁷

An amendment was offered by Ranking Member Velázquez to ensure that such duplication would not impose any new costs on taxpayers. Unfortunately, this amendment was defeated by a vote of 11 to 12.

Imposes unnecessary costs

The Office of Advocacy has a current budget of \$9 million and 46 employees. The approval of H.R. 585 would add new responsibilities and costs to this office as size standard approval and determination requires in-depth industry research and analysis. Such examination may include sector specific surveys, statistical analysis, and regulatory requirements. On this last point, when SBA issues revised size standards, it does so through notice and comment rulemaking. This entails not only writing the rule, but also soliciting and summarizing comments. This process is costly and the Office of Advocacy will be required to take on these rulemaking responsibilities.

These new responsibilities would require additional statistical and legal staff resources, adding as much as 20 percent or more per year to the office's annual budget. As CBO notes in its cost estimate, ". . . the Office of Advocacy would ultimately need 10 additional staff positions to implement its new authority. Because the Office of Advocacy is an independent department within SBA, the office does not have access to SBA's legal and administrative support services; therefore, the office would need to develop that capacity separately. CBO assumes that most of the new positions would fill that need; the remaining positions would provide additional expertise in developing size standard." ⁸

Given the limited budget and staff resources of the Office of Advocacy, this change will add to the mission of the office and may create challenges for it to carryout its existing duties. To this point, Frank Swain, the Chief Counsel of the Office of Advocacy under President Ronald Reagan stated during the June 15, 2011 hearing that "I think the chief counsel has plenty to do without being in the size standard business." ⁹

⁷Hearing before the Committee on Small Business, U.S. House of Representatives, entitled "Lifting the Weight of Regulations: Growing Jobs by Reducing Regulatory Burdens," June 15, 2011, Washington, D.C.

⁸Congressional Budget Office, *Cost Estimate for H.R. 585*, September 27, 2011.

⁹*Ibid.*

Detracts from primary mission of advocating for small businesses

The Office of Advocacy's mission is to provide an independent voice for small business within the federal government. In carrying out this mission, it advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policymakers. H.R. 585 will undermine this specific mission by adding the administrative responsibility of size standard determination to its responsibilities.

Requiring the Office of Advocacy to take on size standard determinations will require them to deviate from their current mission of advocating for small businesses in the regulatory process. Approval of a size standard will require the office to deploy staff resources to these tasks, removing them from their core responsibilities tied to advocating for small businesses.

Instead, the Office of Advocacy should remain as the primary voice of small businesses and the SBA Office of Size Standards should maintain its role as the primary authority on size standards. Doing so not only benefits small businesses, but also the taxpayer.

Conclusion

Despite alleging to solve bureaucratic inefficiencies, H.R. 585 ironically creates such a problem. While proponents may suggest that the legislation simply "transfers" a function from one department to another, what it is really doing is creating a duplicative function within another department. Such "duplication" is regularly cited by proponents of the legislation as a rationale to eliminate many of the SBA's entrepreneurial development programs, including those that serve women, Veterans, and Native Americans. Perhaps these programs could be saved from elimination if they were simply labeled as a "transfer" of training functions for women, Veterans, and Native Americans. Such irony is not lost on the committee's Democrats.

In closing, it is important to remember one simple fact—the SBA already operates an Office of Size Standards. And given its eponymous mission, the SBA's Office of Size Standards is better positioned to maintain all size standard tasks as it can take advantage of the obvious economies of scale and scope associated with these functions.

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