

# PUBLICATION

---

## SBA Issues Proposed Rule Addressing Runway Extension Act of 2018

June 27, 2019

**On Monday, June 24, 2019, the SBA issued a proposed rule (RIN 3245-AH16) to change its size standards to a five-year averaging period for calculating average annual receipts for all receipts-based small business size standards. Size standards based on the number of employees are not impacted. The SBA is seeking public comments on the proposed rule on or before August 23, 2019, which may be submitted [here](#).**

On December 17, 2018, the President signed into law the [Small Business Runway Extension Act of 2018](#) (the Act), which increased the measurement period for calculating the average annual receipts for small business size purposes from three years to five years. But only a few days after the Act was made into law, the SBA issued an Information Notice 6000-180022 stating that "the Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process." SBA's Information Notice provided very little rationale about why the SBA believed that it could delay the enactment of a law passed by Congress and signed by the President. We previously wrote about that [here](#).

Significantly, the [proposed rule](#) confirms that the SBA will continue to apply the three-year averaging period for annual receipts until a final rule is implemented. The SBA also noted that because a small business concern's size is determined as of the date when it certifies its size as part of its initial offer that includes price, the three-year calculation period will apply to any offer submitted by a contractor before the effective date of the final rule. Therefore, even if a final rule is implemented and the SBA receives a request for a size determination or size appeal after the effective date of the final rule, the SBA will still use the three-year averaging period if the determination or appeal involves a size certification that was submitted before the final rule's effective date. Essentially, the SBA is doubling down on its Information Notice 6000-180022 that was issued in December 2018 to confirm that the change to a five-year averaging period will not occur until the SBA decides to make it so.

The SBA justifies its delayed implementation of the Act by stating that the Act actually did not change the SBA's authority to issue size standards, even though the House of Representatives Small Business Committee's [Committee Report](#) stated that the Act "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." The SBA contends that the amendment made by Congress to 15 U.S.C. § 632(a)(2)(C)(ii)(II) does not impact SBA's size standards because the SBA obtains its authority to create size standards from a different section of the statute at 15 U.S.C. § 632(a)(2)(A). Nonetheless, even though the SBA believes it is not required to do so, it is changing to the five-year averaging period to avoid confusion among various standards.

The delayed implementation of the Act has been a contentious issue between Congress and the SBA. It remains to be seen how Congress will react to the SBA's assertion that the Act does not even change the SBA's requirements for issuing size standards. As noted in our [prior update](#) on this topic, some businesses with declining revenues that were expecting to be small under the three-year calculation will now remain large under the Act, while other businesses with increasing revenues will now have more time under the five-year calculation to remain small. While the SBA is clearly taking the position that the three-year averaging period still applies, government contractors are left in a difficult position of deciding how to currently address the

conflicting rules and interpretations, and how to address the future expected changes until this issue is resolved.

For more information on how the proposed rule may impact your particular business and potential methods you can use to address those impacts, please contact any member of [Baker Donelson's Government Contracts Team](#).