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SBA Finalizes Small Business Runway Extension Act Regulations – "Small" has a new meaning/calculation.

2019 has been a busy time for the U.S. Small Business Administration ("SBA") and government contracting. Over the past year, SBA has proposed, and is effectuating, significant changes to various aspects of its government contracting programs. Among those changes is SBA's issuing its final rule (regulations) implementing the Small Business Runway Extension Act (P.L. 115-324) and addressing Congress's later clarifications relating thereto. *See* e.g., H.R. 2345 (directing the SBA Administrator to finalize these regulations within 90 days, and clarifying other issues). Some of these proposed changes are discussed in our blog post of June 25, 2019 (available at https://www.kilpatricktownsend.com/en/Blog/governmentcontracting/2019/6/SBA-Proposes-Finally-to-Change-Method-of-Calculating-Size-Status-Annual-Revenues). Critically, as directed by Congress, on December 5, 2019, the SBA issued its final rulemaking. 84 Fed. Reg. 234 at 66561 et seq. (located at https://www.govinfo.gov/content/pkg/FR-2019-12-05/pdf/2019-26041.pdf), which goes into effect January 6, 2020.
Among the highlights impacting 13 C.F.R. Part 121, are the following:

1. MODIFICATION OF SIZE CALCULATION METHODOLOGY: Perhaps the most critical change to SBA's long-standing size calculation regulations, and one of the most substantial changes made in the past quarter century to SBA's small business regulations, is the modification of how SBA calculates receipts in support of its definition of how a firm is determined to be "small". In the past, for dollar/revenue-based size standards (SBA's size standards are either based on number of employees or average revenue depending upon the size standard), SBA looked at the average annual receipts of a business over the past ***three (3) years***. That duration has now been modified to become average annual receipts over the past ***five (5) years***. This provides a concern with the ability to take a longer period and more years of revenue to determine its size status.
   This should result in more businesses becoming "small" as they can take revenue over a longer period, thereby reducing the relative importance of each year such that entities that are near the size standard in a given year have more years against which to measure the average. In other words, if an entity has a size standard of $30 million and it exceeds that size standard by $10 million in two years ($40 million annually for those two years) but is well below the average in the other three years (say $20 million in annual receipts), it should be better able to retain small business status as a result of having a longer duration against which to measure its size standard. As calculated this would total as follows:

YEAR 1	YEAR 2	YEAR 3	YEAR 4	YEAR 5	AVG. RECEIPTS
$20 million	$40 million	$40 million	$20 million	$20 million	= $140 million Divided by 5 years = $28

					million avg. annual receipts.

As before, if a concern has been in business for less than five years, the same calculation applies, where the business calculates total receipts divided by the number of weeks it has been in business and multiplying that figure by 52.

1. TRANSITION/PHASE-IN PERIOD: Another critical element is that the regulations have announced a transition period through January 6, 2022, during which a firm may calculate its receipts and those of its affiliates using *either* the current 3-year or the new 5-year average. What is not clear is whether that choice is only good one time or if a contractor can transition between the two as it needs.
   Note that this rule goes into effect on January 6, 2020, so it is NOT in place as of this writing and the 3 year average remains in place until that date.

These changes, tied in with the recent increase of size standards by SBA (*see*, July 25, 2019 blog post at https://www.kilpatricktownsend.com/en/Blog/governmentcontracting/2019/7/Small-Businesses-Can-Now-be-a-Little-Larger-Under-the-SBAs-Increased-Size-Standards) should result in a significant increase in small businesses to gain larger contracts, whether set aside or not, and to retain their size status and any resulted preferences for a longer period of time.