



January 11, 2017

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The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency

**Re: TSCA Reporting and Recordkeeping Requirements; Standards for Small Manufacturers and Processors (Docket ID. EPA-HQ-OPPT-2016-0675)**

Dear Administrator McCarthy:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments in response to the Environmental Protection Agency's (EPA) proposed rule, "TSCA Reporting and Recordkeeping Requirements; Standards for Small Manufacturers and Processors."<sup>1</sup> Advocacy agrees that revisions to the current size standard definitions under the TSCA 8(a) reporting requirements are warranted. However, Advocacy believes that EPA has proposed this determination without fully examining all factors relevant to setting an appropriate small business size standard. Advocacy recommends EPA consider a significantly broader set of factors in its development of size standards under TSCA and recommends that EPA engage in a robust consultation with affected small entities. Advocacy further suggests that EPA should convene a Small Business Advocacy Review panel under 5 U.S.C. 609(b) to help address this challenging issue.

**The Office of Advocacy**

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the

<sup>1</sup> 81 Fed. Reg. 90840 (December 15, 2016).

<sup>2</sup> 5 U.S.C. §601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).



RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

## **Background**

The Toxic Substances Control Act (TSCA)<sup>6</sup> gives EPA the authority to establish a small business size standard for purposes of the exemption from reporting under section 8(a) of TSCA.<sup>7</sup> The Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amends TSCA, requires EPA to "review the adequacy of the standards . . . and[,] after providing public notice and an opportunity for comment, make a determination as to whether revision of the standards is warranted."<sup>8</sup>

The EPA's existing size standard, promulgated in 1988, is based on total annual sales, with an exclusion for entities that manufacturer or control a high volume of chemicals. In this notice, EPA presents a preliminary determination that a revision is warranted "because of the magnitude of the increase in the PPI [Producer Price Index] since the last revision of the size standards and the current annual sales standard is comparatively low given current revenue-based size standards developed by SBA[.]"<sup>9</sup>

## **Advocacy's comments**

Advocacy agrees with EPA's preliminary determination that a revision to the size standard is warranted but believes that EPA is not considering the full range of factors necessary to make this determination or to set an appropriate size standard in future actions.

First, the presentation of inflation implies that the 1988 size standard is an appropriate baseline. Advocacy believes that EPA should be considering whether the existing size standard is structured appropriately, not just whether an inflation adjustment is warranted. For example, SBA sets size standards for different industrial sectors at the six-digit NAICS code level,<sup>10</sup> instead of the single one-size-fits-all-industries standard in EPA's existing regulations. EPA should be considering whether a revision is warranted based on the need to have different standards based on the industry. Also, SBA sets size standards for manufacturing and wholesale

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<sup>4</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>5</sup> *Id.*

<sup>6</sup> 15 U.S.C. § 2601 et seq. (1976)

<sup>7</sup> 15 U.S.C. § 2607(a)(3)(B).

<sup>8</sup> 15 U.S.C. § 2607(a)(3)(C); Pub. L. 114-182, § 8(a)(1)(B) (June 22, 2016).

<sup>9</sup> 81 Fed. Reg. at 90842.

<sup>10</sup> For background on SBA Size Standards, see SBA website, "Make Sure You Meet SBA Size Standards,"

(<https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards>)

industries based on the number of employees, not revenue or a measure of inventory volume. EPA should consider whether it is using the appropriate metric for the size of a business.

Second, a comparison between EPA's revenue-based size standards and SBA's revenue-based size standards is not appropriate. In general, SBA uses revenue-based size standards for service industries and employee-based size standards for manufacturing or wholesalers. A comparison of EPA's revenue-based size standard for industries subject to TSCA with SBA's revenue-based size standards for services industries is misleading because it conflates major industrial sectors with significantly different characteristics. It should not be used as basis for determining whether EPA's size standard has been set appropriately without significantly more data and analysis.

### **Recommendations**

Advocacy believes that EPA should be focused on developing the size standard through a rigorous methodology that evaluates the current state of regulated entities, not merely setting the stage for an adjustment of the current size standard for inflation. Advocacy strongly recommends that EPA consider a broader range of factors to determine the appropriate size standard for TSCA reporting. The SBA Size Standard Methodology<sup>11</sup> suggests consideration of such a range of factors, including, but not limited to, the following that EPA might agree are relevant in the context of TSCA reporting:

- Barriers to entry;
- Start-up and expansion costs;
- Extent to which covered industries/businesses are capital-intensive versus labor-intensive;
- Average firm size (employment and revenue);
- Industry competition and concentration;
- Growth trends; and
- Technological changes.

Advocacy further recommends that EPA allow for more granular consideration of industry subgroups. Reporting requirements may affect industry subgroups (*e.g.*, manufacturers vs. processors vs. importers) differently and may merit different size standards.

As EPA moves forward, Advocacy recommends EPA adopt best practices for creating and revising size standards. In particular, EPA should keep the following important principles in mind.

- EPA should propose and seek comment on a quantitative methodology to determine the appropriate size standard.
- Metrics used should rely on the best available and timely data available to EPA.
- Regulated entities must be able to easily calculate whether they qualify as small under the size standard.

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<sup>11</sup> [https://www.sba.gov/sites/default/files/size\\_standards\\_methodology.pdf](https://www.sba.gov/sites/default/files/size_standards_methodology.pdf)

Advocacy recommends EPA consult the [SBA Size Standards Methodology webpage](#)<sup>12</sup> as a helpful point of reference.

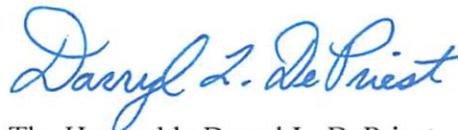
Finally, Advocacy recommends that EPA consider convening a panel under section 609(b) of the Regulatory Flexibility Act on revisions to these size standards. EPA should engage in broad consultation with a wide variety of affected small entities and by statute must consult with the SBA Administrator. The panel process would provide a useful forum for these interactions and encourage collaboration with Advocacy and the Office of Management and Budget on reasonable regulatory alternatives.

**Conclusion**

Advocacy urges EPA to give full consideration to the above issues and recommendations. Advocacy is prepared to work with EPA on these size standards and would welcome the opportunity to engage in broader consultations on these issues.

If you have any questions or require additional information please contact me or Assistant Chief Counsel Tayyaba Waqar at (202) 205-6790 or by email at [twaqar@sba.gov](mailto:twaqar@sba.gov).

Sincerely,



The Honorable Darryl L. DePriest  
Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

Copy to: The Honorable Howard Shelanski  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

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<sup>12</sup> <https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/size-standards-methodology>