

January 28, 2003

Via Facsimile and Online Submission

Docket Clerk
Attn: Docket No. OST-2002-13977
Department of Transportation
400 7th Street, SW
Room PL 401
Washington, DC 20590

RE: Docket No. OST-2002-13977, Participation by Disadvantaged Business
Enterprises in Airport Concessions

Dear Docket Clerk:

The Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in Federal policy making activities.¹ The Chief Counsel participates in rulemakings and other Federal agency activities when he deems it necessary to ensure proper representation of small business interests. The Chief Counsel also monitors agencies' compliance with the Regulatory Flexibility Act (RFA) and works with Federal agencies to ensure that their rulemakings are supported by analyses of the impact that their decisions will have on small entities. Because the Office of Advocacy is an independent entity within the U.S. Small Business Administration (SBA), the views expressed by the Chief Counsel do not necessarily reflect the views of the SBA or the Administration.

The Office of Advocacy is writing regarding a Notice of Proposed Rulemaking Published in the *Federal Register* on December 12, 2002. The proposed rule, Participation by Disadvantaged Business Enterprises in Airport Concessions, solicits comments on proposed adjustments to the size standards for Small Disadvantaged Business Enterprise airport concessionaires. Advocacy is concerned that this proposed rule does not comply with at least two provisions of the RFA.

¹ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§634a-g, 637).

Regulatory Flexibility Act (RFA) Requirements

(1) Certification Deficiency

As stated in section 605(b) of the RFA, the head of an agency may certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The certification must include a statement providing the factual basis for this determination. The proposed rule lacks a discussion of the factual basis supporting the Secretary's decision to certify the proposed rule. For further clarification, the Department of Transportation (DOT) may wish to refer to page 11 in Advocacy's recently revised RFA guide, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*. This guide can be found on Advocacy's website, <http://www.sba.gov/advo/laws/rfaguide.pdf>.

(2) RFA Definition of Small Entity

The certification is also deficient because DOT does not discuss the impact of the proposed rule on two of the three types of small entities recognized by the RFA. Section 601 of the RFA includes a definition for small businesses, small organizations and small governmental jurisdictions. Notwithstanding the fact that the Secretary of DOT may have authority to establish size standards different from the authority of SBA pursuant to Section 3 of the Small Business Act, such statutory authority does not eliminate the RFA's requirement to analyze the impact of the proposed rule on small organizations and small governmental jurisdictions.

Conclusion

The Office of Advocacy recommends that DOT perform an analysis of the proposed rule's impact on other small entities to determine if an Initial Regulatory Flexibility Analysis (IRFA) is appropriate. If the analysis reveals a significant economic impact on a substantial number of small entities, then DOT should publish a supplemental notice in the Federal Register with an IRFA and solicit public comments. If DOT determines that the proposed rule can be certified by the Secretary as not having a significant economic impact on a substantial number of small entities, then the certification with its factual basis may be published with the final rule

If you have any questions regarding this letter, please contact Major L. Clark, III at (202) 205-7150.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Major L. Clark, III
Assistant Chief Counsel for Procurement

Cc: John Graham Administrator, OIRA