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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN: 3245-AE98

Small Business Size Standards; Tour Operators

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is adopting its proposed modification to the way average annual receipts are calculated for firms in the Tour Operators industry (North American Industry Classification System 561520). This change excludes funds received in trust for unaffiliated third parties from the calculation of a tour operator's receipts. The SBA is retaining the current size standard of \$6 million in average annual receipts, as proposed.

DATES: This rule is effective May 5, 2003.

FOR FURTHER INFORMATION CONTACT: Robert N. Ray, Economist, Office of Size Standards, (202) 205-6618.

SUPPLEMENTARY INFORMATION: On October 2, 2002, in response to industry requests, the SBA issued a proposed rule that would modify the way average annual receipts are calculated for firms in the Tour Operators industry (North American Industry Classification System (NAICS) 561520), while retaining the size standard of \$6 million (67 FR 61829). Under the SBA's Small Business Size Regulations (13 CFR 121.104), the receipts of a firm are based on information reported on a firm's Federal tax returns. Generally, receipts reported to the Internal Revenue Service (IRS) include a firm's gross receipts from the sale of goods and services and all other sources of income. The SBA proposed to exclude from the calculation of average annual receipts,

those receipts that are collected for other parties (primarily to the actual transportation and lodging providers) for purposes of determining the size and eligibility of a tour operator for the SBA's assistance. Based on a review of industry practices, the SBA agreed with industry commentators that certain types of receipts should be excluded from the calculation of size for firms in this industry.

Related to this issue, the SBA also considered whether the current size standard continues to be appropriate if receipts collected for third party reimbursement are excluded from a firm's gross receipts. Based on a review of industry data discussed in the proposed rule, the SBA believes the current size standard is appropriate even if size is measured on an adjusted basis rather than by gross receipts. For more information on the size standard analysis of the Tour Operators industry, and the justification for excluding receipts held in trust for payment to transportation and lodging providers, see the October 2, 2002, proposed rule.

Comments on the proposed rule all supported the revised method of calculating the average annual receipts of a tour operator and retaining the \$6 million size standard. Accordingly, the SBA is revising its size standard measure for the Tour Operators industry by excluding funds received in trust for unaffiliated third parties, while retaining the size standard of \$6 million.

Discussion of Comments on the Proposed Rule

The SBA received six comments to the proposed rule. Four comments were from firms in the industry, one comment was from a travel agency, and one was from members of Congress (six U.S. Representatives co-signed a single comment letter).

In summary, all six commentators supported the change to \$6 million in adjusted annual receipts. They all, however, had the following two additional recommendations:

(1) The SBA should extend the application period for its Economic Injury Disaster Loan (EIDL) Program for 60 days after the size standard is revised; and

(2) The SBA should clarify that trust receipts do not refer to formal legal trusts.

Response to Issues Raised by the Comments

The comments expressed the concern that many tour operators continue to need assistance as a result of the September 11, 2001, terrorist attacks, but had not applied for EIDL assistance because they exceeded the gross receipts size standard. The EIDL program provides assistance to businesses that have suffered substantial economic injury, regardless of physical damage, and is located in a declared disaster area. The SBA extended the deadline for submitting an application for EIDL assistance for the September 11, 2001, terrorist attacks until January 31, 2003, for businesses located in the presidentially designated disaster areas of New York and Northern Virginia. However, for areas outside of the area of the physical declaration, the SBA's extension period expired on September 30, 2002. With a revision to the size standard, the commentators recommended that the SBA extend the EIDL application deadline for 60 days after the implementation of the size standard, to afford the newly eligible tour operators an opportunity to apply for EIDL assistance.

The SBA will not grant an extension of the EIDL deadline for tour operators. The SBA carefully considered the reasons presented by the commentators to extend the application deadline, but has elected not to adopt that recommendation.

The comments also recommended that the SBA clarify that "trust receipts" do not require the creation of a formal legal trust. In determining the receipts of a tour operator and other specifically identified activities, footnote 10 of the size standards table allows for the exclusion of "funds received in trusts for an unaffiliated third party, such as books subject to commissions" (13 CFR 121.201). The language of this provision does not require the creation of a legal trust. The SBA follows the "law of agency" in determining whether receipts may be excluded. If money is received under a claim of right, it must be included as the firm's receipts. If, on the other hand, it is received as an agent for another, the money is excluded (see *Size Appeal of Mid-Columbia Engineering*, SBA No. 4134, (1996)). Thus, the current provision does not require that the excludable funds be passed through a legal trust.