Proposed Rules

Federal Register

Vol. 77, No. 139

Thursday, July 19, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG25

Small Business Size Standards: Utilities

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to revise the small business size standards for nine industries in North American Industry Classification System (NAICS) Sector 22, Utilities. Six of those industries deal with electric power generation, distribution and transmission (NAICS 221111, NAICS 221112, NAICS 221113, NAICS 221119, NAICS 221121, and NAICS 221122) and have a common size standard based on electric output. For those six industries, SBA proposes to replace the current size standard of 4 million megawatt hours in electric output with an employee based size standard of 500 employees. SBA also proposes to increase the small business size standards for three industries in NAICS Sector 22 that have receipt based size standards, namely—NAICS 221310, Water Supply and Irrigation Systems, from $7 million to $25.5 million; NAICS 221320, Sewage Treatment Facilities, from $7 million to $19 million; and NAICS 221330, Steam and Air-conditioning Supply, from $12.5 million to $14 million. As part of its ongoing initiative to review all size standards, SBA evaluated all industries in NAICS Sector 22 that have either electric output based or receipts based size standards to determine whether the existing size standards should be retained or revised. This rule is one of a series of proposed rules that will examine industries grouped by NAICS sector. SBA has issued a White Paper entitled ''Size Standards Methodology'' and published in the October 21, 2009 issue of the **Federal Register** a notice that ''Size Standards Methodology'' is available on its Web site at *www.sba.gov/size* for public review and comments. The ''Size Standards Methodology'' White Paper explains how SBA establishes, reviews and modifies its small business size standards. In this proposed rule, SBA has applied its methodology that pertains to establishing, reviewing, and modifying a size standard based on average annual receipts and electric output.

DATES: SBA must receive comments to this proposed rule on or before September 17, 2012.

ADDRESSES: Identify your comments by RIN 3245–AG25 and submit them by one of the following methods: (1) *Federal eRulemaking Portal: www.regulations.gov* follow the instructions for submitting comments; or (2) *Mail/Hand Delivery/Courier:* Khem R. Sharma, Ph.D., Chief, Size Standards Division, 409 Third Street SW., Mail Code 6530, Washington, DC 20416. SBA will not accept comments submitted by email.

SBA will post all comments to this proposed rule on *www.regulations.gov*. If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov*, you must submit such information to U.S. Small Business Administration, Khem R. Sharma, Ph.D., Chief, Size Standards Division, 409 Third Street SW., Mail Code 6530, Washington, DC 20416, or send an email to *sizestandards@sba.gov*. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review your information and determine whether it will make the information public.

FOR FURTHER INFORMATION CONTACT: Khem R. Sharma, Ph.D., Chief, Size Standards Division, (202) 205–6618 or *sizestandards@sba.gov*.

SUPPLEMENTARY INFORMATION: To determine eligibility for Federal small business assistance, SBA establishes small business size definitions (referred to as size standards) for private sector industries in the United States. SBA uses two primary measures of business size: average annual receipts and average number of employees. SBA uses financial assets, electric output, and refining capacity to measure the size for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC), Certified Development Company (504) and 7(a) Loan Programs use either the industry based size standards or net worth and net income based size standards to determine eligibility for those programs. At the beginning of SBA's comprehensive size standards review, there were 41 different size standards, covering 1,141 NAICS industries and 18 sub-industry activities (''exceptions'' in SBA's table of size standards). Thirty-one of these size levels were based on average annual receipts, seven were based on average number of employees, and three were based on other measures.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy, in particular the changes in the Federal contracting marketplace and industry structure. The last time SBA conducted a comprehensive review of size standards was during the late 1970s and early 1980s. Since then, most reviews of size standards have been limited to a few specific industries in response to requests from the public and Federal agencies. SBA also makes periodic inflation adjustments to its monetary based size standards. SBA's latest inflation adjustment to size standards was published in the **Federal Register** on July 18, 2008 (73 FR 41237).

Because of changes in the Federal marketplace and industry structure since the last overall size standards review, SBA recognizes that current data may no longer support some of its existing size standards. Accordingly, in 2007, SBA began a comprehensive review of all size standards to determine if they are consistent with current data, and to adjust them when necessary. In addition, on September 27, 2010, the President of the United States signed the Small Business Jobs Act of 2010 (Jobs Act). The Jobs Act directs SBA to conduct a detailed review of all size standards and to make appropriate adjustments to reflect market conditions. Specifically, the Jobs Act requires SBA to conduct a detailed review of at least one-third of all size standards during every 18-month period from the date of its enactment. In addition, the Jobs Act requires that SBA conduct a review of all size standards not less frequently than once every 5 years thereafter. Reviewing existing small business size standards and making appropriate adjustments based on current data are also consistent with Executive Order 13563 on improving regulation and regulatory review.

Rather than review all size standards at one time, SBA is reviewing a group of industries within an NAICS Sector. An NAICS Sector generally consists of 25 to 75 industries, except for the manufacturing sector, which has considerably more industries. Once SBA completes its review of size standards for industries in an NAICS Sector, it will issue a proposed rule to revise size standards for those industries for which currently available data and other relevant factors support doing so.

Below is a discussion of SBA's size standards methodology for establishing receipts based size standards, which SBA applied to this proposed rule, including analyses of industry structure, Federal procurement trends and other factors for industries reviewed in this proposed rule, the impact of the proposed revisions to size standards on Federal small business assistance, and the evaluation of whether a revised size standard would exclude dominant firms from being considered small.

Size Standards Methodology

SBA has recently developed a ''Size Standards Methodology'' for developing, reviewing and modifying size standards when necessary. SBA has published this document on its Web site at *www.sba.gov/size* for public review and comments and included it, as a supporting document, in the electronic docket for this proposed rule at *www.regulations.gov*. SBA does not apply every feature of its ''Size Standards Methodology'' to all industries because not all features are appropriate. For example, since this proposed rule covers all industries with receipts based size standards in NAICS Sector 22, the methodology described here applies to establishing receipts based standards. However, the methodology is made available in its entirety for parties who are interested in SBA's overall approach to establishing, evaluating and modifying small business size standards. SBA always explains its analysis in individual proposed and final rules relating to size standard revisions for specific industries.

SBA welcomes comments from the public on a number of issues concerning its ''Size Standards Methodology,'' such as suggestions on alternative approaches to establishing and modifying size standards; whether there are alternative or additional factors that SBA should consider; whether SBA's approach to small business size standards makes sense in the current economic environment; whether SBA's use of anchor size standards is appropriate in the current economy; whether there are gaps in SBA's methodology because of the lack of comprehensive data; and whether there are other facts or issues that SBA should consider. Comments on SBA's methodology should be submitted via: (1) The Federal eRulemaking Portal: *www.regulations.gov*; the docket number is SBA–2009–0008; follow the instructions for submitting comments; or (2) Mail/Hand Delivery/Courier: Khem R. Sharma, Ph.D., Chief, Size Standards Division, 409 Third Street SW., Mail Code 6530, Washington, DC 20416. As with comments received to this and other proposed rules, SBA will post all comments on its methodology on *www.regulations.gov*. As of July 19, 2012, SBA has received 14 comments to its ''Size Standards Methodology.'' The comments are available to the public at *www.regulations.gov*. SBA continues to welcome comments on its methodology from interested parties.

Congress granted discretion to the SBA's Administrator to establish detailed small business size standards. 15 U.S.C. 632(a)(2). Section 3(a)(3) of the Small Business Act (15 U.S.C. 632(a)(3)) requires that ''* * * the [SBA] Administrator shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the Administrator.'' Accordingly, the economic structure of an industry serves as the underlying basis for developing and modifying small business size standards. SBA identifies the small business segment of an industry by examining data on the economic characteristics defining the industry structure itself (as described below). In addition to analysis of industry structure, SBA also considers current economic conditions, together with its own mission, program objectives, and the Administration's current policies, suggestions from industry groups and Federal agencies, and public comments on the proposed rule, when it establishes small business size standards. SBA also examines whether a size standard based on industry and other relevant data successfully excludes businesses that are dominant in the industry. This proposed rule affords the public an opportunity to review and comment on SBA's proposals to revise size standards in NAICS Sector 22, as well as on the data and methodology it uses to evaluate and revise a size standard.

Industry Analysis

For the current comprehensive size standards review, SBA has established three ''base'' or ''anchor'' size standards: $7 million in average annual receipts for industries that have receipts based size standards, 500 employees for manufacturing and other industries that have employee based size standards (except for Wholesale Trade), and 100 employees for industries in the Wholesale Trade Sector. SBA established 500 employees as the anchor size standard for manufacturing industries at its inception in 1953. Shortly thereafter, SBA established $1 million in average annual receipts as the anchor size standard for nonmanufacturing industries. SBA has periodically increased the receipts based anchor size standard for inflation, and it stands today at $7 million. Since 1986, SBA has set 100 employees as the size standard for all industries in the Wholesale Trade Sector for SBA financial assistance programs. However, NAICS codes for Wholesale Trade Industries (NAICS Sector 42) and their 100 employee size standard do not apply to Federal procurement programs. Rather, for Federal procurement purposes, the size standard is 500 employees for all industries in Wholesale Trade and for all industries in Retail Trade (NAICS Sector 44–45) under SBA's nonmanufacturer rule (13 CFR 121.406(b)).

These long-standing anchor size standards have stood the test of time and gained legitimacy through practice and general public acceptance. An anchor size standard is neither a minimum nor a maximum. It is a common size standard for a large number of industries that have similar economic characteristics and serves as a reference point in evaluating size standards for individual industries. SBA uses the anchor in lieu of trying to establish precise small business size standards for each industry. Otherwise, theoretically, the number of size standards might be as high as the number of industries for which SBA establishes size standards (1,141). Furthermore, the data SBA analyzes are static, while the U.S. economy is not. Hence, absolute precision is impossible. Therefore, SBA presumes an anchor size standard is appropriate for a particular industry unless that industry displays economic characteristics that are considerably different from others with the same anchor size standard.

When evaluating a size standard, SBA compares the economic characteristics of the specific industry under review to the average characteristics of industries with one of the three anchor size standards (referred to as ''anchor comparison group''). This allows SBA to assess the industry structure and to determine whether the industry is appreciably different from the other industries in the anchor comparison group. If the characteristics of a specific industry under review are similar to the average characteristics of the anchor comparison group, the anchor size standard is considered appropriate for that industry. SBA may consider adopting a size standard below the anchor when: (1) All or most of the industry characteristics are significantly smaller than the average characteristics of the anchor comparison group; or (2) other industry considerations strongly suggest that the anchor size standard would be an unreasonably high size standard for the industry.

If the specific industry's characteristics are significantly higher than those of the anchor comparison group, then a size standard higher than the anchor size standard may be appropriate. The larger the differences are between the characteristics of the industry under review and those in the anchor comparison group, the larger will be the difference between the appropriate industry size standard and the anchor size standard. To determine a size standard above the anchor size standard, SBA analyzes the characteristics of a second comparison group. For industries with receipts based size standards, including those in NAICS Sector 22 that are reviewed in this proposed rule, SBA has developed a second comparison group consisting of industries with the highest levels of receipts based size standards. To determine the level of a size standard above the anchor size standard, SBA analyzes the characteristics of this second comparison group. The size standards for this group of industries range from $23 million to $35.5 million in average annual receipts, with the weighted average size standard for the group being $29 million. SBA refers to this comparison group as the ''higher level receipts based size standard group.''

The primary factors that SBA evaluates when analyzing the structural characteristics of an industry include average firm size, startup costs and entry barriers, industry competition, and distribution of firms by size. SBA also evaluates, as an additional primary factor, the impact that revising size standards might have on Federal contracting assistance to small businesses. These are, generally, the five most important factors SBA examines when establishing or revising a size standard for an industry. In addition, SBA considers and evaluates other information that it believes is relevant to a particular industry (such as technological changes, growth trends, SBA financial assistance and other program factors, *etc.*). SBA also considers possible impacts of size standard revisions on eligibility for Federal small business assistance, current economic conditions, the Administration's policies, and suggestions from industry groups and Federal agencies. Public comments on a proposed rule also provide important additional information. SBA thoroughly reviews all public comments before making a final decision on its proposed size standards. Below are brief descriptions of each of the five primary factors that SBA has evaluated for each industry in NAICS Sector 22 being reviewed in this proposed rule. A more detailed description of this analysis is provided in SBA ''Size Standards Methodology,'' available at *http://www.sba.gov/size*.

1. *Average firm size.* SBA computes two measures of average firm size: Simple average and weighted average. For industries with receipts based size standards, the simple average is the total receipts of the industry divided by the total number of firms in the industry. The weighted average firm size is the sum of weighted simple averages in different receipts size classes, where weights are the shares of total industry receipts for respective size classes. The simple average weighs all firms within an industry equally, regardless of their size. The weighted average overcomes that limitation by giving more weight to larger firms.

If the average firm size of an industry under review is significantly higher than the average firm size of industries in the anchor comparison industry group, this will generally support a size standard higher than the anchor size standard. Conversely, if the industry's average firm size is similar to or significantly lower than that of the anchor comparison industry group, it will be a basis to adopt the anchor size standard, or in rare cases, a standard lower than the anchor.

2. *Startup costs and entry barriers.* Startup costs reflect a firm's initial size in an industry. New entrants to an industry must have sufficient capital and other assets to start and maintain a viable business. If new firms entering a particular industry have greater capital requirements than firms in industries in the anchor comparison group, this can be a basis for establishing a size standard higher than the anchor size standard. In lieu of data on actual startup costs, SBA uses average assets as a proxy to measure the capital requirements for new entrants to an industry.

To calculate average assets, SBA begins with the total sales to total assets ratio for an industry from the Risk Management Association's Annual eStatement Studies. SBA then applies these ratios to the average receipts of firms in that industry. An industry with a significantly higher level of average assets than that of the anchor comparison group is likely to have higher startup costs; this in turn will support a size standard higher than the anchor. Conversely, an industry with average assets that are similar to or significantly lower than those of the anchor comparison group is likely to have lower startup costs; this in turn will support adoption of the anchor size standard, or in rare cases, one lower than the anchor.

3. *Industry competition.* Industry competition is generally measured by the share of total industry receipts generated by the largest firms in an industry. SBA generally evaluates the share of industry receipts generated by the four largest firms in each industry. This is referred to as the ''four-firm concentration ratio,'' a commonly used economic measure of market competition. SBA compares the four-firm concentration ratio for an industry under review to the average four-firm concentration ratio for industries in the anchor comparison group. If a significant share of economic activity within the industry is concentrated among a few relatively large companies, all else being equal, SBA will establish a size standard higher than the anchor size standard. SBA does not consider the four-firm concentration ratio as an important factor in assessing a size standard if its value for an industry under review is less than 40 percent. For industries in which the four-firm concentration ratio is 40 percent or more, SBA examines the average size of the four largest firms in determining a size standard.

4. *Distribution of firms by size.* SBA examines the shares of industry total receipts accounted for by firms of different receipts and employment size classes in an industry. This is an additional factor that SBA evaluates in assessing competition within an industry. If most of an industry's economic activity is attributable to smaller firms, this indicates that small businesses are competitive in that industry. This supports adopting the anchor size standard. If most of an

industry's economic activity is attributable to larger firms, this indicates that small businesses are not competitive in that industry. This will support adopting a size standard above the anchor.

Concentration is a measure of inequality of distribution. To determine the degree of inequality of distribution in an industry, SBA computes the Gini coefficient by constructing the Lorenz curve. The Lorenz curve presents the cumulative percentages of units (firms) along the horizontal axis and the cumulative percentages of receipts (or other measures of size) along the vertical axis. (For further detail, please refer to SBA's ''Size Standards Methodology'' on SBA's Web site at *www.sba.gov/size*.) Gini coefficient values vary from zero to one. If receipts are distributed equally among all the firms in an industry, the value of the Gini coefficient will equal zero. If an industry's total receipts are attributed to a single firm, the Gini coefficient will equal one.

SBA compares the Gini coefficient value for an industry under review with that for industries in the anchor comparison group. If an industry shows a higher Gini coefficient value than industries in the anchor comparison industry group this may, all else being equal, warrant a higher size standard than the anchor. Conversely, if an industry's Gini coefficient is similar to or lower than that for the anchor group, the anchor standard, or in some cases a standard lower than the anchor, may be adopted.

5. *Impact on Federal contracting and SBA loan programs.* SBA examines the impact a size standard change may have on Federal small business assistance. This most often focuses on the share of Federal contracting dollars awarded to small businesses in the industry in question. In general, if the small business share of Federal contracting in an industry with significant Federal contracting is appreciably less than the small business share of the industry's total receipts, there is justification for considering a size standard higher than the existing size standard. The disparity between the small business Federal market share and the industry-wide small business share may have a variety of causes, such as extensive administrative and compliance requirements associated with Federal contracts, different skill sets required for Federal contracts as compared to typical commercial contracting work, and the size of Federal contracts. These, and other factors, are likely to influence the type of firms that compete for Federal contracts. By comparing the Federal contracting small business share with the industry-wide small business share, SBA includes in its size standards analysis the latest Federal contracting trends. This analysis may indicate a size standard larger than the current standard.

SBA considers Federal procurement trends in the size standards analysis only if: (1) The small business share of Federal contracting dollars is at least 10 percent lower than the small business share of total industry receipts, and (2) the amount of total Federal contracting averages $100 million or more during the latest three fiscal years. These thresholds reflect a significant level of contracting where a revision to a size standard may have an impact on contracting opportunities to small businesses.

Besides the impact on small business Federal contracting, SBA also evaluates the impact of a proposed size standard on SBA's loan programs. For this, SBA examines the volume and number of SBA guaranteed loans within an industry and the size of firms obtaining those loans. This allows SBA to assess whether the existing or the proposed size standard for a particular industry may restrict the level of financial assistance to small firms. If the analysis shows that the current size standards have impeded financial assistance to small businesses within an industry, this can support higher size standards. However, if small businesses within an industry under current size standards have been receiving significant amounts of financial assistance through SBA's loan programs, or businesses receiving the financial assistance are much smaller than the existing size standards, this factor may not be considered for determining the size standards.

Sources of Industry and Program Data

SBA's primary source of industry data used in this proposed rule is a special tabulation of the data from 2007 Economic Census (see *www.census.gov/econ/census07/*) prepared by the U.S. Bureau of the Census (Census Bureau) for SBA. The special tabulation provides SBA with data on the number of firms, number of establishments, number of employees, annual payroll, and annual receipts of companies by NAICS Sector (2-digit level), Subsector (3-digit level), Industry Group (4-digit level), Industry (6-digit level). These data are arrayed by various classes of firms' size based on the overall number of employees and receipts of the entire enterprise (all establishments and affiliated firms) from all industries. The special tabulation enables SBA to evaluate average firm size, the four-firm concentration ratio and distribution of firms by receipts and employment size.

In some cases, where industry data were not available due to disclosure prohibitions in the Census Bureau's tabulation, SBA either estimated missing values using available relevant data or examined data at a higher level of industry aggregation, such as at the NAICS 2-digit (Sector), 3-digit (Subsector), or 4-digit (Industry Group) level. In some instances, SBA had to base its analysis only on those factors for which data were available or estimates of missing values were possible.

For industries that provide electric power generation, distribution and transmission (NAICS codes 221111–221122), SBA received data from the U.S. Energy Information Agency (EIA) (*www.eia.gov/cneaf/electricity*) and an industry association. The Census Bureau's Economic Census does not provide data on electric output. The EIA data include annual electric output in megawatt hours and total annual revenues from electricity sales by class of ownership of individual entities involved in the generation, transmission, or distribution of electricity in the U.S. SBA analyzed EIA electric output data for investor-owned utilities and power marketers for 1974–2009 to evaluate industry structure of these industries. The industry association data also included the EIA data and additional information on affiliation among firms in the electric power generation, transmission, and distribution industries.

To calculate average assets, SBA used sales to total assets ratios from the Risk Management Association's Annual eStatement Studies, 2008–2010.

To evaluate Federal contracting trends, SBA examined data representing Federal contract awards for fiscal years 2008–2010. The data are available from the U.S. General Service Administration's Federal Procurement Data System—Next Generation (FPDS–NG).

To assess the impact on financial assistance to small businesses SBA examined data on its own guaranteed loan programs for fiscal years 2008–2010.

Dominance in Field of Operation

Section 3(a) of the Small Business Act (15 U.S.C. 632(a)) defines a small business concern as one that is: (1) Independently owned and operated; (2) not dominant in its field of operation; and (3) within a specific small business size definition or size standard established by the SBA Administrator. SBA considers as part of its evaluation whether a business concern at a proposed size standard would be dominant in its field of operation. For this, SBA generally examines the industry's market share of firms at the proposed size standard. Market share and other factors may indicate whether a firm can exercise a major controlling influence on a national basis in an industry where a significant number of business concerns are engaged. If a contemplated size standard would include a dominant firm, SBA will consider a lower size standard to exclude the dominant firm from being defined as small.

Selection of Size Standards

To simplify size standards, for the ongoing comprehensive review of receipts based size standards, SBA has proposed to select size standards from a limited number of levels. For many years, SBA has been concerned about the complexity of determining small business status caused by a large number of varying receipts based size standards (*see* 69 FR 13130 (March 4, 2004) and 57 FR 62515 (December 31, 1992)). At the beginning of the current comprehensive size standards review, there were 31 different levels of receipts based size standards. They ranged from $0.75 million to $35.5 million, and many of them applied to only one or a few industries. SBA believes that size standards with such a large number of small variations among them are both unnecessary and difficult to justify analytically. To simplify managing and using size standards, SBA proposes that there be fewer size standard levels. This will produce more common size standards for businesses operating in related industries. This will also result in greater consistency among the size standards for industries that have similar economic characteristics.

SBA proposes, therefore, to apply one of eight receipts based size standards to each of the three industries in NAICS Sector 22 with a receipts-based size standard. The eight ''fixed'' receipts based size standard levels are $5 million, $7 million, $10 million, $14 million, $19 million, $25.5 million, $30 million, and $35.5 million. To establish these eight receipts based size standard levels, SBA considered the current minimum, the current maximum, and the most commonly used current receipts based size standards. At the start of the current comprehensive size standards review, the most commonly used receipts based size standards clustered around the following: $2.5 million to $4.5 million, $7 million, $9 million to $10 million, $12.5 million to $14 million, $25 million to $25.5 million, and $33.5 million to $35.5 million. SBA selected $7 million as one of eight fixed levels of receipts based size standards because it is an anchor standard for receipts based standards. The lowest or minimum receipts based size level will be $5 million. Other than the standards for agriculture and those based on commissions (such as real estate brokers and travel agents), $5 million will include those industries that at the start of the comprehensive size standards review had the lowest receipts based standards, which ranged from $2 million to $4.5 million. Among the higher level size clusters, SBA has set four fixed levels, namely: $10 million, $14 million, $25.5 million, and $35.5 million. Because there are large intervals between some of the fixed levels, SBA also established two intermediate levels, namely $19 million between $14 million and $25.5 million, and $30 million between $25.5 million and $35.5 million. These two intermediate levels reflect roughly the same proportional differences as between the other two successive levels.

Evaluation of Industry Structure

Of 10 industries in NAICS Sector 22, Utilities, SBA has evaluated the structure of six industries engaged in generation, distribution and transmission of electricity that have size standards based on electric output of 4 million megawatt hours and three industries that have size standards based on average annual receipts to assess the appropriateness of the current size standards. In this proposed rule, SBA has not reviewed one industry that has an employee based size standard in NAICS Sector 22 (NAICS 221210, Natural Gas Distribution). That employee based size standard will remain in effect until SBA reviews all employee based size standards at a later date.

As explained previously, if the characteristics of an industry under review are similar to the average characteristics of industries in the anchor comparison group, the anchor size standard is generally considered appropriate for that industry. If an industry's structure is significantly different from industries in the anchor group, a size standard lower or higher than the anchor size standard might be selected. The level of the new size standard is based on the difference between the characteristics of the anchor comparison group and a second industry comparison group. As described above, the second comparison group for receipts based standards consists of industries with the highest receipts based size standards, ranging from $23 million to $35.5 million. The average size standard for this group is $29 million. SBA refers to this group of industries as the ''higher level receipts based size standard comparison group.'' SBA determines differences in industry structure between an industry under review and the industries in the two comparison groups by comparing data on each of the industry factors, including average firm size, average assets size, the four-firm concentration ratio, and the Gini coefficient of distribution of firms by size. Table 1, Average Characteristics of Receipts Based Comparison Groups, below, shows two measures of the average firm size (simple and weighted), average assets size, the four-firm concentration ratio, average receipts of the four largest firms, and the Gini coefficient for both anchor level and higher level comparison groups for receipts based size standards.

TABLE 1—AVERAGE CHARACTERISTICS OF RECEIPTS BASED COMPARISON GROUPS

Receipts based comparison group	Avg. firm size ($ million)		Avg. assets size ($ million)	Four-firm concentration ratio (%)*	Avg. receipts of four largest firms ($ million)*	Gini coefficient
	Simple average	Weighted average				
Anchor Level	1.32	19.63	0.84	16.6	196.4	0.693
Higher Level	5.07	116.84	3.20	32.1	1,376.0	0.830

*To be used for industries with a four-firm concentration ratio of 40% or greater.

Derivation of Receipts Based Size Standards Based on Industry Factors

For each industry factor in Table 1, Average Characteristics of Receipts Based Comparison Groups, above, SBA derives a separate size standard based on the differences between the values for an industry under review and the values for the two comparison groups. If the industry value for a particular factor is near the corresponding factor for the anchor comparison group, SBA will consider the $7 million anchor size standard appropriate for that factor.

An industry factor with a value significantly above or below the anchor comparison group will generally warrant a size standard for that industry above or below the $7 million anchor. The level of the new size standard in these cases is based on the proportional difference between the industry value and the values for the two comparison groups.

For example, if an industry's simple average receipts are $3.3 million, that would support a $19 million size standard. The $3.3 million level is 52.8 percent between the average firm size of $1.32 million for the anchor comparison group and $5.07 million for the higher level comparison group (($3.30 million − $1.32 million) ÷ ($5.07 million − $1.32 million) = 0.528 or 52.8%). This proportional difference is applied to the difference between the $7 million anchor size standard and average size standard of $29 million for the higher level size standard group and then added to $7 million to estimate a size standard of $18.62 million ([{$29.0 million − $7.0 million} * 0.528] + $7.0 million = $18.62 million). The final step is to round the estimated $18.62 million size standard to the nearest fixed size standard, which in this example is $19 million.

SBA applies the above calculation to derive a size standard for each industry factor. Detailed formulas involved in these calculations are presented in SBA's ''Size Standards Methodology,'' which is available on its Web site at *www.sba.gov/size*. (However, it should be noted that the figures in the ''Size Standards Methodology'' White Paper are based on 2002 Economic Census data and are different from those presented in this proposed rule. That is because when SBA prepared its ''Size Standards Methodology,'' the 2007 Economic Census data were not yet available). Table 2, Values of Industry Factors and Supported Size Standards, below, shows ranges of values for each industry factor and the levels of size standards supported by those values.

TABLE 2—VALUES OF INDUSTRY FACTORS AND SUPPORTED SIZE STANDARDS

If simple avg. receipts size is ($ million)	*Or if* weighted avg. receipts size is ($ million)	*Or if* avg. assets size is ($ million)	*Or if* avg. receipts of largest four firms is ($ million)	*Or if* Gini coefficient is	*Then* size standard is ($ million)
<1.15	<15.22	<0.73	<142.8	<0.686	5.0
1.15 to 1.57	15.22 to 26.26	0.73 to 1.00	142.8 to 276.9	0.686 to 0.702	7.0
1.58 to 2.17	26.27 to 41.73	1.01 to 1.37	277.0 to 464.5	0.703 to 0.724	10.0
2.18 to 2.94	41.74 to 61.61	1.38 to 1.86	464.6 to 705.8	0.725 to 0.752	14.0
2.95 to 3.92	61.62 to 87.02	1.87 to 2.48	705.9 to 1,014.1	0.753 to 0.788	19.0
3.93 to 4.86	87.03 to 111.32	2.49 to 3.07	1,014.2 to 1,309.0	0.789 to 0.822	25.5
4.87 to 5.71	111.33 to 133.41	3.08 to 3.61	1,309.1 to 1,577.1	0.823 to 0.853	30.0
>5.71	>133.41	>3.61	>1,577.1	>0.853	35.5

Derivation of Receipts Based Size Standards Based on Federal Contracting Factor

Besides industry structure, SBA also evaluates Federal contracting data to assess how successful small business are in getting Federal contracts under the existing size standards. For the current comprehensive size standards review, SBA has decided to designate a size standard at one level higher than the current size standard for industries where the small business share of total Federal contracting dollars is between 10 and 30 percentage points lower than their shares in total industry receipts and at two levels higher than the current size standard if the difference is more than 30 percentage points.

SBA has chosen not to designate a size standard for the Federal contracting factor alone that is higher than two levels above the current size standard. The FPDS–NG data have a number of limitations and there are also complex relationships among a number of variables affecting small business participation in the Federal marketplace. SBA believes, therefore, that a larger adjustment to size standards based on Federal contracting activity should be based on a more detailed analysis of the impact of any subsequent revision to the current size standard. In limited situations, however, SBA may conduct a more extensive examination of Federal contracting experience. This may enable SBA to support a different size standard than indicated by this general rule and take into consideration significant and unique aspects of small business competitiveness in the Federal contract market. SBA welcomes comment on its methodology of incorporating the Federal contracting factor in the size standard analysis and suggestions for alternative methods and other relevant information on small business experience in the Federal contract market.

Among the three industries that have receipts based size standards in NAICS Sector 22, two (NAICS codes 221310 and 221320) received an average of $100 million or more annually in Federal contracts during fiscal years 2008–2010. Of these two industries, the Federal contracting factor was significant (*i.e.,* the difference between the small business share of total industry receipts and small business share of Federal contracting dollars was 10 percentage points or more) for only NAICS 221310.

New Receipts Based Size Standards Based on Industry and Federal Contracting Factors

Table 3, New Receipts Based Size Standards Supported by Each Factor for Each Industry (millions of dollars), below, shows the results of analyses of industry and Federal contracting factors for each of the three industries with receipts based standards in NAICS Sector 22. Each NAICS Industry in columns 2, 3, 4, 6, 7 and 8 shows two numbers. The upper number is the value for the industry or federal contracting factor shown on the top of the column; the lower number is the size standard supported by that factor. For the four-firm concentration ratio, a size standard is estimated based on the average receipts of the top four firms if its value is 40 percent or more. If the four-firm concentration ratio for an industry (column 5) is less than 40 percent, no size standard is estimated for that factor. Column 9 shows the new size standard for each industry, calculated as the average of size standards supported by each factor and rounded to the nearest fixed size level. Analytical details involved in the averaging procedure are described in the SBA ''Size Standard Methodology'' White Paper which is available on its Web site at *www.sba.gov/size.* For comparison, the current size standards are also shown in column 10 of Table 3, New Receipts Based Size Standards Supported by Each Factor for Each Industry (millions of dollars), below.

TABLE 3—NEW RECEIPTS BASED SIZE STANDARDS SUPPORTED BY EACH FACTOR FOR EACH INDUSTRY

[Millions of dollars]

(1) NAICS	(2) Simple average firm size ($ million)	(3) Weighted average firm size ($ million)	(4) Average assets size ($ million)	(5) Four-firm ratio (%)	(6) Four-firm average size ($ million)	(7) Gini coefficient	(8) Federal contract factor (%)	(9) New size standard ($ million)	(10) Current size standard ($ million)
221310, Water supply and irrigation systems	$2.2	$110.7	$7.5	46.5	$886.6	0.854	−15.0%		
	14.0	25.5	$35.5		19.0	$35.5	$10.0	$25.5	$7.0
221320, Sewage treatment facilities	3.5	37.0		55.8	182.7	0.834	9.8%		
	19.0	10.0			7.0	$30.0		19.0	7.0
221330, Steam and air-conditioning supply	27.3	50.6		61.4	155.2	0.501			
	35.5	14.0			7.0	$5.0		14.0	12.5

Evaluation of Electric Utilities Industries (NAICS Codes 221111 to 221122)

NAICS Industry Group 2211, Electric Power Generation, transmission, and distribution, consists of six industries that currently have a common size standard of 4 million megawatt hours (MWh) from the sale and total electric output for the preceding fiscal year. These industries are: NAICS 221111, Hydroelectric Power Generation; NAICS 221112, Fossil Fuel Electric Power Generation; NAICS 221113, Nuclear Electric Power Generation; NAICS 221119, Other Electric Power Generation; NAICS 221121, Electric Bulk Power Transmission and Control; and NAICS 221122, Electric Power Distribution. To qualify as small under this size standard, a firm, including its affiliates, must be primarily engaged in the generation, transmission and/or distribution of electric energy for sale and its total electric output for preceding fiscal year does not exceed 4 million megawatt hours (*see* Footnote 1 in 13 CFR 121.201). SBA included this requirement with the 4 million MWh size standard to prevent large non-electric firms and/or their electric services subsidiaries from qualifying as small.

In this proposed rule, SBA has considered three possible changes to the current size standard for the six industries under NAICS Industry Group 2211: (1) Increasing the current MWh based size standard from 4 million MWh to 8 million MWh, and modifying Footnote 1; (2) adding an employee based size standard of 500 employees along with the 8 million MWh size standard and eliminating Footnote 1; and (3) replacing the current 4 million MWh size standard with an employee based size standard of 500 employees and eliminating Footnote 1.

SBA is concerned that the ''primarily engaged'' requirement to qualify as small under the MWh based size standard may restrict Federal contracting opportunities for small businesses that are developing capabilities in electric energy production and are still engaged in activities in other industries. To qualify as small under receipts based and employee based size standards for other industries, SBA's size regulations do not include the ''primary industry'' requirement to compete as an eligible small business on Federal procurement. In addition, the current footnote could be interpreted incorrectly that the concern and each of its affiliates must be primarily engaged in electric generation, transmission, or generation. That was never the intent of the footnote. Rather the footnote was meant to look at primary industry of the concern and its affiliates as a whole. The ''primarily engaged'' requirement would no longer be necessary by combining an employee based size standard with the MWh based size standard or by replacing it with an employee based size standard.

SBA established the 4 million MWh size standard for electric services in 1974 (39 FR 22163, June 20, 1974 and 39 FR 30345, August 22, 1974). Prior to that, a generic receipts based size standard of $1 million was applied to electric services and other services industries for which SBA had not established an industry specific size standard. SBA provided only the general reasons for adopting the 4 million MWh size standard in the 1974 proposed and final rules. SBA's analysis of industry data available at that time from the Federal Power Administration had found that the largest 20 percent of firms dominated the industry in terms of total electric output, sales, assets, *etc.* SBA also observed a trend of increased concentration in the industry. At the 4 million MWh size standard, as the proposed and final rules noted, a small business would account for not more than 0.3 percent of total industry output.

The electric power industry has undergone significant structural changes since the 1970s. As with other regulated industries, the electric power industry underwent deregulation leading to unbundling of generation, transmission, and distribution activities. Retail competition also has been introduced in 15 states in place of local monopolies in the electric power market. Merger and acquisition activities in recent years, especially by holding companies, have further contributed to the growing concentration in the electric power industry. New firms producing electric power using alternative energy sources (solar, wind, *etc.*) have entered the industry and these firms tend to be generally smaller than firms producing electricity using conventional energy sources such as fossil fuel. Electric power marketers selling electricity in wholesale and retail markets have also emerged as the result of deregulation. Thus, the electric power industry today comprises different firms that generate, transmit, and/or distribute electric services as compared to one company integrating all of these activities in the past. Although the electric power industry has undergone significant changes, many large electric power producers still continue to generate, transmit, and/or distribute electric power either themselves or through various subsidiaries. The current industry's structure reflecting the deregulated environment may have implications on the appropriateness of the current size standard for electric utilities.

The uniqueness of the electric power industry presents several challenges in analyzing the size standard for NAICS Industry Group 2211. Due to the highly capital intensive nature of generating and transmitting electricity, a few very large firms account for most of the generation and transmission of electric power. However, a large number of small firms also generate and distribute a small amount of electric power. As a result of the concentration of most of the activity in the few largest firms and the small number of firms operating in most of the specific industries for electric generation, transmission, and distribution industries, data from the Census Bureau's special tabulation contain a significant amount of suppressed data, limiting our ability to use them for size standards analysis using SBA's size standards methodology. More importantly, the Census Bureau's Economic Census does not collect data on electric output and no comparison groups exist to assess differing characteristics of individual industries based on electric output, thereby rendering most of the SBA's size standards methodology not applicable to analyze MWh based size standards for electric utilities.

Consequently, SBA has examined the changes in electric power industry structure since 1974 using data on privately owned for-profit electric generators to assess whether the current size standard should be modified to more appropriately reflect today's electric power industry composition. As mentioned earlier, these data were obtained from the EIA's Web site and were adjusted for affiliation using the information provided by an industry association. Data on electric power generators are the appropriate data available that are most comparable with the data SBA evaluated in 1974. Because of the lack of comparable historical data on electric transmission and distribution, the new size standard that SBA has considered proposing for electric generators will also apply to the transmission, and distribution industries. Although deregulation has resulted in unbundling of generation, transmission, and distribution activities, many of the firms engaged in the electric power generation are still engaged in transmission or/and distribution activities. Thus, SBA believes that a common size standard is still more appropriate for all the electric generation, transmission, and distribution industries than having a separate size standard for each of these activities, whether it is based on MWh, number of employees, or combination of both.

Based on the historical analysis of industry factors, one of the three alternatives SBA considered is to increase the current 4 million MWh size standard for NAICS Industry Group 2211, to 8 million MWh. SBA bases this proposed increase on several considerations. First, the data show that the industry has become much more concentrated today than it was in the early 1970s. Data on electric power generators from the U.S. Department of Energy's Energy Information Agency (EIA) and an analysis provided to SBA by an industry association showed that the share of the largest 20 percent of firms in the industry output increased from 73 percent in 1974 to 97 percent in 2009. Similarly, the Gini coefficient index characterizing the distribution of firms by electric output size increased from 0.698 to 0.909 during that period. These two trends indicate a significant increase in industry concentration and strongly support an increase to the existing size standard. Second, despite the increased industry concentration, average firm size decreased by almost 16 percent from 7.6 million MWh in 1974 to 6.4 million MWh in 2009. As mentioned above, many new, very small firms have entered the electric power generation industry. This decline in average firm size indicates that the current size standard may not need to be increased. Third, to attain the 1974 market share of a small electric utility company of 0.3 percent and the 1974 cumulative market share of small electric utilities of 6.7 percent of the industry output in 2009 would support an increase to the current size standard in the range of 6 million MWh to 9 million MWh.

SBA examined Federal contracting trends for electric power generation, transmission, and distribution during fiscal years 2008–2010. Federal contracting for NAICS Industry Group 2211 averaged $1.7 billion per year during this period. Of these total Federal contract dollars, small businesses obtained approximately 6 percent, which was very similar to the small business share of total industry receipts. Because the small business share in the Federal market was similar to the small business share of total industry receipts, the Federal contracting was not a significant factor. However, small business shares of both total contract dollars and total industry receipts for electric services industries were appreciably lower than those for other industries, warranting an increase to the current size standard.

SBA considered proposing an 8 million MWh size standard, as it would maintain the small business coverage ratio at the 4 million MWh size standard in 1974. This would also make the small business coverage ratio for electric services industries more comparable with the small business ratios for most other industries that have size standards in terms of the number of employees or average annual receipts. The small business coverage ratios (*i.e.,* the percentage of total firms in an industry classified as small) for electric services industries under the current 4 million MWh size standard are appreciably lower than those for other industries. SBA, however, is concerned that a size standard that is more than two times the current size standard would include extremely large firms with billions of dollars in revenues, as well as firms that may not need Federal assistance designed for small businesses. Smaller firms within the electric power industry today tend to be much more specialized in providing alternative sources of energy on a much smaller scale than traditional electric power generators. Wholesale and retail power marketers that sell power generated by very large electric power generators also tend to be relatively small. A size standard more than two times the current size standard may put these small electric power generators and small power marketers in competitive disadvantage, and it may result in mischaracterizing the small business segment of the electric power industry.

If SBA were to adopt the solely MWh based measure of 8 million MWh size standard for NAICS Industry Group 2211 considered above, it believes that Footnote 1 needs to be revised to make it clearer how SBA determines whether a firm is primarily engaged in electric generation, transmission, or distribution. As discussed previously, a reader of the current footnote might incorrectly interpret that the concern and each of its affiliates must be primarily engaged in electric generation, transmission or generation. To correct this, SBA would consider revising Footnote 1 by substituting the term ''primarily engaged'' with ''primary industry'' and applying 13 CFR 121.107 when determining the primary industry of the firm. With these changes, the revised Footnote 1 would read as follows:

1. *NAICS codes 221111, 221112, 221113, 221119, 221121,* and *221122*—A firm, combined with its affiliates, is

small if its primary industry is the generation, transmission, and/or distribution of electric energy for sale, and its total electric output for the preceding fiscal year did not exceed 8 million megawatt hours. In determining small business eligibility, the megawatt hours of the firm and each affiliate are combined and the determination of primary industry is based on the provisions of 13 CFR 121.107.

Comments supporting the first alternative in which SBA considered to increase the size standard to 8 million MWh should also address whether the suggested changes to the existing footnote will sufficiently clarify and improve upon the application of a primary industry requirement.

As an alternative to increasing the current MWh based size standard, SBA considered adding an employee based size standard along with the proposed 8 million MWh size standard and removing Footnote 1 on the ''primarily engaged'' requirement. As discussed above, SBA is concerned that the current requirement for a firm to be primarily engaged in generation, transmission, or distribution of electric power to qualify for Federal small business assistance may have adversely affected small businesses interested in Federal contracting opportunities. Since deregulation, Federal agencies have been seeking out small businesses involved in the electric power generation using alternative energy sources and/or in electric power distribution for procurement of electric power. SBA has received several size protests involving the application of the requirement that businesses be primarily engaged in generation, transmission, or distribution of electric power to qualify for Federal small business assistance. The purpose of the ''primarily engaged'' requirement was to prevent a large business not involved in the electric power generation, transmission, or distribution industries from qualifying itself or its electric power affiliate(s) as small. Based on review of those cases, SBA believes that requirement under today industry's structure may be too restrictive and, therefore, unintentionally limiting Federal contracting opportunities for small businesses involved in electric generation and distribution. By combining an employee based size standard with the MWh based size standard, affiliations with other businesses will be fully captured through number of employees, thereby rendering the ''primarily engaged'' requirement unnecessary.

Accordingly, SBA has considered adding a 500 employee size standard along with the 8 million MWh size standard and removing Footnote 1. The 500 employee size standard is based on a comparison of the small business coverage ratios under the proposed 8 million MWh size standard and the same small business coverage ratio in terms of number of employees. An electric power generator with 250 to 500 employees has a market share of approximately 0.3 percent and the cumulative market share of approximately 9 percent of the industry electric output. Although SBA could have also considered proposing a 250 employee size standard, it believes that a 500 employee size standard is more appropriate for two reasons. First, a 500 employee size standard is more consistent with SBA's ''Size Standards Methodology'' that considers 500 employees as a starting point (*i.e.,* 500 employees is the employee based anchor size standard) for considering an employee based size standard for an industry. Second, since the industry coverage ratios under the 250 employees size standard would be considerably lower than typically observed in most other industries with receipts based or employee based size standards, selecting the higher 500 employee size standard may better capture the small business segment within the electric utilities industry.

Adding number of employees as a component of the size standard would not be unique to industries in NAICS Industry Group 2211. The small business size standard for NAICS 324110, Petroleum Refineries, has had two components to its size standard for at least 20 years. Currently a petroleum refiner is small for Federal government procurement if it has no more than 1,500 employees and refining capacity of 125,000 barrels per calendar day.

As the second alternative to increasing the current size standard to 8 million MWh, SBA also considered proposing to replace the current MWh based size standard with a 500 employee size standard. An employee based size standard has several advantages over the MWh based size standard. First, as stated earlier, the ''primarily engaged'' requirement (Footnote 1) would no longer be necessary under the employee based size standard as it will capture the total size of firms that are involved in both electric services industries and nonelectric industries. Second, this would eliminate the difficulty in ascertaining the ''primarily engaged'' requirement in size status protests involving companies that are engaged in both electric services and other industries. Third, without the ''primarily engaged'' requirement under an employee based size standard, new entrants to electric power industry (especially small firms that generate electric power using alternative sources and still have significant involvement in other industries) can qualify for small business contracting opportunities. Fourth, the number of employees is a more appropriate measure to determine small business size status. Under the MWh based measure, to qualify as small for electric services only the electric output generated, transmitted, or distributed is counted. All other activities of the firm are not counted in determining its size. Consequently, a firm involved in multiple industries may be significantly larger than another firm at the same electric output level that is exclusively involved in electric services. This is inconsistent with how SBA defines size standards for other industries in which the size of a firm includes the employees or receipts from all industries. Fifth, the number of employees would also be consistent with the size measure SBA uses for all manufacturers, and several other industries. SBA also uses an employee based size standard to establish eligibility to provide manufactured products for Federal government as small distributors. Electric generation, while not classified as manufacturing under the NAICS, involves processes that are akin to manufacturing in creating electric power. The process transforms some form of raw materials (such as fossil fuel, wind, solar, hydro, *etc.*) to electric power through the application of significant levels of capital equipment and infrastructure. Furthermore, as discussed in SBA's ''Size Standards Methodology,'' an industry that is capital intensive is generally viewed by SBA as supporting an employee based size standard. Sixth, this would enable SBA to analyze size standards for electric services industries more consistently by using its ''Size Standards Methodology'' that it applies to all receipts and employee based size standards. Seventh, an employee based size standard would also help simplify size standards.

Among the three options considered, SBA strongly favors, for the reasons discussed above, adopting the second alternative to the MWh based size standard that would replace the current 4 million MWh size standard and the ''primarily engaged'' requirement in Footnote 1 with an employee based size standard of 500 employees. SBA is specifically interested in comments addressing adverse consequences, if any, of using a 500 employee size standard instead of a MWh based size standard. The comments should explain how an employee based size standard could impact small businesses and why the number of employees would be a less preferable size standard measure to a MWh based measure. Barring any adverse consequences, SBA would strongly consider eliminating the MWh based size standard and adopting just an employee size standard instead. However, the Agency is reluctant to eliminate the MWh based size standard without first providing the public with an opportunity to comment on this change, along with an assessment of whether an updated 8 million MWh size standard or combining it with a 500 employee size standard would be more appropriate instead.

To simplify size standards, SBA has established or proposed common size standards for closely related industries in other NAICS Sectors. Within NAICS Sector 22, SBA is proposing a 500 employees common size standard for all industries in NAICS Industry Group 2211 for consistency with the current common size standard and for simplification of size standards by having fewer differing size standard levels. In addition, as mentioned earlier, Census suppresses much of the industry level data due to the limited number of electric generation, transmission, and distribution firms. The data reflect that activity is concentrated among a few large firms. This makes analyzing industry specific size standards extremely difficult. In addition, many businesses engaged in electric services also operate in one or two of the other industries. Consequently, industry specific size standards may result in businesses typically engaged in other closely related industries subject to differing size standards.

Evaluation of Dominance in Field of Operation

SBA has determined that no firm in NAICS Sector 22, Utilities, for which it has proposed to increase or modify size standards, will be large enough at the proposed size standard to dominate its field of operation. At the proposed size standards, if adopted, small business shares of total industry receipts among those industries vary from 0.3 percent to 1.5 percent. These levels of market share effectively preclude a firm at the proposed size standards from exerting control on its industry.

Proposed Changes to Size Standards

Based on the analyses discussed above, SBA proposes to increase receipts based size standards for three industries and change measure of size from the megawatt hours to the number of employees in six industries in Sector 22. The proposed changes are summarized in Table 4, Summary of Proposed Size Standards Revisions, below.

TABLE 4—SUMMARY OF PROPOSED SIZE STANDARDS REVISIONS

NAICS Code	NAICS industry title	Current size standard	Proposed size standard
221111	Hydroelectric Power Generation	4 million megawatt hours	500 employees.
221112	Fossil Fuel Electric Power Generation	4 million megawatt hours	500 employees.
221113	Nuclear Electric Power Generation	4 million megawatt hours	500 employees.
221119	Other Electric Power Generation	4 million megawatt hours	500 employees.
221121	Electric Bulk Power Transmission and Control	4 million megawatt hours	500 employees.
221122	Electric Power Distribution	4 million megawatt hours	500 employees.
221310	Water Supply and Irrigation Systems	$7.0 million	$25.5 million.
221320	Sewage Treatment Facilities	$7.0 million	$19.0 million.
221330	Steam and Air-Conditioning Supply	$12.5 million	$14.0 million.

Request for Comments

SBA invites public comments on this proposed rule, especially on the following issues.

1. To simplify size standards, SBA proposes eight fixed levels for receipts based size standards: $5 million, $7 million, $10 million, $14 million, $19 million, $25.5 million, $30 million, and $35.5 million. SBA invites comments on whether simplification of size standards in this way is necessary and if these proposed fixed size levels are appropriate. SBA welcomes suggestions on alternative approaches to simplifying small business size standards.

2. SBA seeks feedback on whether the proposed levels of size standards are appropriate given the economic characteristics of each industry. SBA also seeks feedback and suggestions on alternative standards, if they would be more appropriate, including whether the number of employees is a more suitable measure of size for certain industries that currently have either receipts or megawatt hours based size standards and what that employee level should be.

3. SBA's proposed size standards are based on its evaluation of five primary factors: average firm size, average assets size (as a proxy of startup costs and entry barriers), four-firm concentration ratio, distribution of firms by size, and the level and small business share of Federal contracting dollars. SBA welcomes comments on these factors and/or suggestions of other factors that it should consider for assessing industry characteristics when evaluating or revising size standards. SBA also seeks information on other relevant data sources, if available.

4. SBA gives equal weight to each of the five primary factors in all industries. SBA seeks feedback on whether it should continue giving equal weight to each factor or whether it should give more weight to one or more factors for certain industries. Recommendations to weigh some factors more than others should include suggestions on specific weights for each factor for those industries along with supporting information.

5. For some industries, based on its analysis of industry and program data, SBA proposes to increase the existing size standards by a large amount (such as NAICS 221310 and 221320) while for NAICS 221330 the proposed increase is modest. SBA seeks feedback on whether it should, as a policy, limit the increase to a size standard and/or whether it should, as a policy, establish minimum or maximum values for its size standards. SBA seeks suggestions on appropriate levels of changes to size standards and on their minimum or maximum levels.

6. SBA has proposed to replace the current 4 million megawatt hours size standard for all six industries in NAICS Industry Group 2211 with a 500 employee size standard and eliminate Footnote 1 requiring that a business concern be primarily engaged in electric generation, transmission, or distribution to qualify as small for Federal small

business assistance. SBA invites comments on whether replacing the current megawatt hours based size standard with an employee based size standard is appropriate or whether it will have any adverse impacts on small businesses. Comments that the employee based size standard would have an adverse impact or that it is not appropriate should explain how it could impact small businesses and why a standard based on MWh is preferable to one based on number of employees.

7. SBA also considered proposing to increase the current MWh based size standard for electric services industries to 8 million MWh as one alternative and to add a 500 employee size standard to the updated 8 million MWh standard as another alternative. Under the latter alternative, SBA also considered proposing to eliminate Footnote 1. SBA seeks comments on whether a combination of megawatt hours and the number of employees is a more appropriate size standard than either the number of employees only or megawatt hours only.

8. If SBA were to adopt only the MWh based size standard of 8 million MWh for NAICS Industry Group 2211, it considered revising Footnote 1 to read as follows: ''NAICS codes 221111, 221112, 221113, 221119, 221121, and 221122—A firm, combined with its affiliates, is small if its primary industry is the generation, transmission, and/or distribution of electric energy for sale, and its total electric output for the preceding fiscal year did not exceed 8 million megawatt hours. In determining small business eligibility, the megawatt hours of the firm and each affiliate are combined and the determination of primary industry is based on the provisions of 13 CFR 121.107.'' SBA seeks comments on whether the revision to the existing footnote is necessary and if so whether the revised footnote will sufficiently clarify and improve upon the application of a primary industry requirement.

9. SBA has proposed a 500 employee based common size standard for all industries within NAICS Industry Group 2211 (electric generation, transmission, and distribution). SBA seeks comments on whether it should continue using a common size standard or adopt separate size standard for electric generation, transmission, and distribution. If commenters believe that separate size standards would be more appropriate, they should explain why and recommend appropriate size standards for specific industries.

10. For analytical simplicity and efficiency, in this proposed rule, SBA has refined its size standard methodology to obtain a single value as a proposed size standard instead of a range of values as it used in its past size regulations. SBA welcomes any comments on this procedure and suggestions on alternative methods.

Public comments on the above issues are very valuable to SBA for validating its size standard methodology and proposed revisions to size standards in this proposed rule. This will help SBA to move forward with its review of size standards for other NAICS Sectors. Commenters addressing size standards for a specific industry or a group of industries should include relevant data and/or other information supporting their comments. If comments relate to using size standards for Federal procurement programs, SBA suggests that commenters provide information on the size of contracts, the size of businesses that can undertake the contracts, start-up costs, equipment and other asset requirements, the amount of subcontracting, other direct and indirect costs associated with the contracts, the use of mandatory sources of supply for products and services, and the degree to which contractors can mark up those costs. Compliance With Executive Orders 12866, 13563, 12988 and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612).

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a ''significant'' regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a ''major rule,'' however, under the Congressional Review Act (5 U.S.C. 800).

Regulatory Impact Analysis

1. Is there a need for the Regulatory Action?

SBA believes that the proposed size standards for a number of industries in NAICS Sector 22, Utilities, will better reflect the economic characteristics of small businesses and the Federal government marketplace in those industries. SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development and advocacy programs. To assist the intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to SBA's Administrator the responsibility for establishing small business definitions. The Act also requires that small business definitions vary to reflect industry differences. The recently enacted Small Business Jobs Act also requires SBA to review all size standards and make necessary adjustments to reflect market conditions. The Supplementary Information section of this proposed rule explains SBA's methodology for analyzing a size standard for a particular industry.

2. What are the Potential Benefits and Costs of this Regulatory Action?

The most significant benefit to businesses obtaining small business status because of this rule is gaining eligibility for Federal small business assistance programs. These include SBA's financial assistance programs, economic injury disaster loans, and Federal procurement programs intended for small businesses. Federal procurement programs provide targeted opportunities for small businesses under SBA's business development programs, such as 8(a), Small Disadvantaged Businesses (SDB), small businesses located in Historically Underutilized Business Zones (HUBZones), women-owned small businesses (WOSB), and service-disabled veteran-owned small business concerns (SDVO SBC). Federal agencies may also use SBA size standards for a variety of other regulatory and program purposes. These programs assist small businesses to become more knowledgeable, stable, and competitive. In nine industries for which SBA has proposed increasing size standards, SBA estimates that about 400 additional firms will obtain small business status and become eligible for these programs. That represents approximately seven percent of the total number of firms that are classified as small under the current standards in all industries within NAICS Sector 22 that are reviewed in this proposed rule. If adopted as proposed, this will increase the small business share of total industry receipts from approximately 21 percent under the current size standards to 27 percent.

Three groups will benefit from these proposed size standards if they are adopted as proposed: (1) Some businesses that are above the current size standards will gain small business status under the revised size standards, thereby enabling them to participate in Federal small business assistance programs; (2) growing small businesses that are close to exceeding the current size standards will be able to retain their small business status under the revised size standards, thereby enabling them to continue their participation in the programs; and (3) Federal agencies will have a larger pool of small businesses from which to draw for their small business procurement programs.

Under SBA's 7(a) Business and 504 Loan Programs, based on the fiscal years 2008 to 2010 data, SBA estimates that around 10 to 15 additional loans totaling about $2 million to $3 million in Federal loan guarantees could be made to these newly defined small businesses under the proposed size standards. Increasing the size standards will likely result in an increase in small business guaranteed loans to businesses in these industries, but it would be impractical to try to estimate exactly the extent of their number and total amount loaned. Under the Jobs Act, SBA can now guarantee substantially larger loans than in the past. In addition, the Jobs Act established an alternative size standard ($15 million in tangible net worth and $5 million in net income after income taxes) for business concerns that do not meet the size standards for their industry. Therefore, SBA finds it similarly difficult to quantify the impact of these proposed standards on its 7(a) and 504 Loan Programs.

Newly defined small businesses will also benefit from SBA's Economic Injury Disaster Loan (EIDL) Program. However, since the benefit under this program is contingent on the occurrence and severity of a disaster, SBA cannot make a meaningful estimate of benefits for future disasters.

To the extent that those 400 newly defined additional small firms could become active in Federal procurement programs, the proposed changes, if adopted, may entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement opportunities. In addition, there could be more firms seeking SBA guaranteed loans, more firms eligible for enrollment in the CCR's Dynamic Small Business Search database and more firms seeking certification as 8(a) or HUBZone firms or those qualifying for small business, WOSB, SDVO SBC, and SDB status. Among those newly defined small businesses seeking SBA assistance, there could be some additional costs associated with compliance and verification of small business status and protests of small business status. These added costs will be minimal because mechanisms are already in place to handle these administrative requirements.

Additionally, the costs to the Federal Government may be higher on some Federal contracts. With a greater number of businesses defined as small, Federal agencies may choose to set aside more contracts for competition among small businesses rather than using full and open competition. The movement from unrestricted to small business set-aside contracting might result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers. However, the additional costs associated with fewer bidders, however, are expected to be minor since, as a matter of law, procurements may be set aside for small businesses or reserved for the 8(a), HUBZone, WOSB, or SDVO SBC Programs only if awards are expected to be made at fair and reasonable prices. In addition, higher costs may result if more full and open contracts are awarded to HUBZone businesses that receive price evaluation preferences.

The proposed size standards, if adopted, may have some distributional effects among large and small businesses. Although SBA cannot estimate with certainty the actual outcome of the gains and losses among small and large businesses, it can identify several probable impacts. There may be a transfer of some Federal contracts to small businesses from large businesses. Large businesses may have fewer Federal contract opportunities as Federal agencies decide to set aside more Federal contracts for small businesses. In addition, some Federal contracts may be awarded to HUBZone firms instead of large businesses since these firms may be eligible for a price evaluation preference for contracts when they compete on a full and open basis. Similarly, currently defined small businesses may obtain fewer Federal contracts due to the increased competition from more businesses defined as small. This transfer may be offset by a greater number of Federal procurements set aside for all small businesses. The number of newly defined and expanding small businesses that are willing and able to sell to the Federal Government will limit the potential transfer of contracts away from large and currently defined small businesses. SBA cannot estimate the potential distributional impacts of these transfers with any degree of precision. The proposed revisions to the existing size standards for NAICS Sector 22, Utilities, are consistent with SBA's statutory mandate to assist small business. This regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit, Government contracts, and management and technical assistance. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to the small business programs designed to assist them.

Executive Order 13563

A description of the need for this regulatory action and benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, is included above in the Regulatory Impact Analysis under Executive Order 12866.

In an effort to engage interested parties in this action, SBA has presented its size standards methodology (discussed above under Supplementary Information) to various industry associations and trade groups. SBA also met with various industry groups to get their feedback on its methodology and other size standards issues. In addition, SBA presented its size standards methodology to businesses in 13 cities in the U.S. and sought their input as part of the Jobs Act Tours. The presentation included information on the status of the comprehensive size standards review and on how interested parties can provide SBA with input and feedback on size standards review.

Additionally, SBA sent letters to the Directors of the Offices of Small and Disadvantaged Business Utilization (OSDBU) at several Federal agencies with considerable procurement responsibilities requesting their feedback on how the agencies use SBA size standards and whether current standards meet their programmatic needs (both procurement and non-procurement). SBA gave appropriate consideration to all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies in preparing this proposed rule.

The review of size standards in NAICS Sector 22, Utilities, is consistent with Executive Order 13563, Section 6, calling for retrospective analyses of existing rules. As discussed previously, SBA's last comprehensive review of size standards was during the late 1970s and early 1980s. Since then, except for periodic adjustments of monetary based size standards for inflation, most reviews were limited to a few specific industries in response to requests from the public and Federal agencies. SBA recognizes that changes in industry structure and the Federal marketplace over time have rendered existing size standards for some industries no longer supportable by current data.

Accordingly, in 2007, SBA began a comprehensive review of its size standards to ensure that existing size standards have supportable bases and to revise them when necessary. In addition, on September 27, 2010, the President of the United States signed the Small Business Jobs Act of 2010 (Jobs Act). The Jobs Act directs SBA to conduct a detailed review of all size standards and to make appropriate adjustments to reflect market conditions. Specifically, the Jobs Act requires SBA to conduct a detailed review of at least one-third of all size standards during every 18-month period from the date of its enactment and do a complete review of all size standards not less frequently than once every 5 years thereafter.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice reforms, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that this proposed rule will not have substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule will not impose new reporting or record keeping requirements.

Initial Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this proposed rule, if adopted, may have a significant impact on a substantial number of small entities in NAICS Sector 22, Utilities. As described above, this rule may affect small entities seeking Federal contracts, loans under SBA's 7(a), 504 and Economic Injury Disaster Loan Programs, and assistance under other Federal small business programs.

Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) of this proposed rule addressing the following questions: (1) What are the need for and objective of the rule?; (2) What are SBA's description and estimate of the number of small entities to which the rule will apply?; (3) What are the projected reporting, record keeping and other compliance requirements of the rule?; (4) What are the relevant Federal rules that may duplicate, overlap or conflict with the rule?; and (5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

1. What are the need for and objective of the rule?

Most of the size standards in NAICS Sector 22, Utilities, have not been reviewed since the early 1980s. Technology, productivity growth, international competition, mergers and acquisitions, and updated industry definitions may have changed the structure of many industries in the Sector. Such changes can be sufficient to support a revision to size standards for some industries. Based on its analysis of the latest data available, SBA believes that the proposed size standards in this rule more appropriately reflect the size of businesses in those industries that need Federal assistance. The recently enacted Small Business Jobs Act also requires SBA to review all size standards and make necessary adjustments to reflect market conditions.

2. What is SBA's description and estimate of the number of small entities to which the rule will apply?

If the proposed rule is adopted in its present form, SBA estimates that about 400 additional firms will become small because of proposed revisions to size standards in nine industries. That represents about 7 percent of total firms that are small under current size standards in all industries within NAICS Sector 22 covered by this proposed rule. This will result in an increase in the small business share of total industry receipts for those industries from about 21 percent under the current size standards to about 27 percent under the proposed size standards. The proposed size standards, if adopted, will enable more small businesses to retain their small business status for a longer period. Many have lost their eligibility and find it difficult to compete at such low levels with companies that are significantly larger than they are. SBA believes the competitive impact will be positive for existing small businesses and for those that exceed the current size standards but are on the very low end of those that are not small. They might otherwise be called or referred to as mid-sized businesses, although SBA only defines what is small; other entities are other than small.

3. What are the projected reporting, record keeping and other compliance requirements of the rule?

Proposed size standards changes do not impose any additional reporting or record keeping requirements on small entities. However, qualifying for Federal procurement and a number of other Federal programs requires that entities register in the Central Contractor Registration (CCR) database and certify at least annually that they are small in the Online Representations and Certifications Application (ORCA). Therefore, businesses opting to participate in those programs must comply with CCR and ORCA requirements. There are no costs associated with either CCR registration or ORCA certification. Changing size standards alters eligibility for SBA programs that assist small businesses, but does not impose a regulatory burden as they neither regulate nor control business behavior.

4. What are the relevant Federal rules, which may duplicate, overlap or conflict with the rule?

Under § 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(a)(2)(c), Federal agencies must use SBA's size standards to define a small business, unless specifically authorized by statute to do otherwise. In 1995, SBA published in the **Federal Register** a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988 (November 24, 1995)). SBA is not aware of any Federal rule that would duplicate or conflict with establishing size standards.

However, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards if they believe that SBA's size standards are not appropriate for their programs, with the approval of SBA's Administrator (13 CFR 121.903). Additionally, the Regulatory Flexibility Act authorizes an Agency to establish an alternative small business definition after consultation with the Office of Advocacy of the U.S. Small Business Administration (5 U.S.C. 601(3)).

5. What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

By law, SBA is required to develop numerical size standards for establishing eligibility for Federal small business assistance programs. Other than varying size standards by industry and changing the size measures, no practical alternative exists to the systems of numerical size standards.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, SBA proposes to amend 13 CFR part 121 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

2. In § 121.201, in the table, revise the entries for ''221111'', ''221112'', ''221113'', ''221119'',''221121'', ''221122'', ''221310'', ''221320'', and ''221330'' to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
*	*	*	*
221111	Hydroelectric Power Generation		500
221112	Fossil Fuel Electric Power Generation		500
221113	Nuclear Electric Power Generation		500
221119	Other Electric Power Generation		500
221121	Electric Bulk Power Transmission and Control		500
221122	Electric Power Distribution		500
*	*	*	*
221310	Water Supply and Irrigation Systems	$25.5	
221320	Sewage Treatment Facilities	19.0	
221330	Steam and Air-Conditioning Supply	14.0	
*	*	*	*

3. In § 121.201, at the end the table ''Small Business Size Standards by NAICS Industry,'' remove and reserve Footnote 1 to read as follows:

* * * * *

FOOTNOTES

1. [Reserved].

* * * * *

Dated: February 28, 2012.

Karen G. Mills,

Administrator.

[FR Doc. 2012–17441 Filed 7–18–12; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0755; Directorate Identifier 99–CE–65–AD]

RIN 2120–AA64

Airworthiness Directives; Piaggio Aero Industries S.p.A.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); rescission.

SUMMARY: We propose to rescind Airworthiness Directive (AD) 200–07–11 for all Piaggio Aero Industries S.p.A Model P–180 airplanes. That AD was prompted by mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Italy. We issued that AD to prevent the brake hydraulic fluid from leaking because of the brake assembly rods contacting the brake valve tubing, which could result in the inability to adequately stop the airplane during ground operations. Since we issued that AD, we have determined this is no longer an unsafe condition and that regularly scheduled annual inspections address this subject.

DATES: We must receive comments on this proposed AD by September 4, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Mike Kiesov, Aerospace Safety Engineer, FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106; telephone: (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0755; Directorate Identifier 99–CE–65–AD'' at the beginning of your