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Karen G. Mills,

Administrator.

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG28

Small Business Size Standards: Real Estate and Rental and Leasing

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The United States Small Business Administration (SBA) is increasing the small business size standards for 21 industries and one sub-industry in North American Industry Classification System (NAICS) Sector 53, Real Estate and Rental and Leasing, and retaining the current standards for the remaining four industries in that Sector. As part of its ongoing comprehensive review of all size standards, SBA evaluated all size standards for industries in NAICS Sector 53 to determine whether they should be retained or revised.

DATES: This rule is effective October 24, 2012.

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SUPPLEMENTARY INFORMATION: To determine eligibility for Federal small business assistance programs, SBA establishes small business size definitions (referred to as size standards) for private sector industries in the United States. The SBA's existing size standards use two primary measures of business size, average annual receipts and number of employees. Financial assets, electric output and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC), 7(a), and Certified Development Company (CDC or 504) Loan Programs determine small business eligibility using either the industry based size standards or alternative net worth and net income size based standards. At the start of the current comprehensive review of SBA's small business size standards, there were 41 different size standards levels, covering 1,141 NAICS industries and 18 sub-industry activities. Of these, 31 were based on average annual receipts, seven based on number of employees, and three based on other measures.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy, and in particular, that they do not reflect changes in the Federal contracting marketplace and industry structure. The last comprehensive review of size standards was during the late 1970s and early 1980s. Since then, most reviews of size standards were 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. The latest inflation adjustment to size standards was published in the **Federal Register** on July 18, 2008 (73 FR 41237).

SBA recognizes that changes in industry structure and the Federal marketplace since the last overall review 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 determine whether existing size standards have supportable bases relative to the current data, and to revise them, where 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 every18-month period from the date of its enactment and 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.

SBA has chosen not to review all size standards at one time. Rather, it is reviewing groups of related industries on a Sector by Sector basis.

As part of SBA's comprehensive review of size standards, the Agency reviewed all size standards in NAICS Sector 53, Real Estate and Rental and Leasing, to determine whether the existing size standards should be retained or revised. After its review, SBA published a proposed rule for public comment in the November 15, 2011 issue of the **Federal Register** (76 FR 70680) on its proposal to increase the size standards for 20 industries and one sub-industry in NAICS Sector 53. The rule was one of a series of proposed rules that examines industries grouped by NAICS Sector.

SBA recently developed a ''Size Standards Methodology'' for developing, reviewing, and modifying size standards, when necessary. SBA published the document on its Web site at *www.sba.gov/size* for public review and comments, and also included it as a supporting document in the electronic docket of the proposed rule at *www.regulations.gov*.

In evaluating an industry's size standard, SBA examines its characteristics (such as average firm size, startup costs, industry competition and distribution of firms by size) and the level and small business share of Federal contract dollars in that industry. SBA also examines the potential impact a size standard revision might have on its financial assistance programs, and whether a business concern under a revised size standard would be dominant in its industry. SBA analyzed the characteristics of each industry in NAICS Sector 53, mostly using a special tabulation obtained from the U.S. Bureau of the Census from its 2007 Economic Census (the latest available). SBA also evaluated the level and small business share of Federal contracts in each of those industries using the data from the Federal Procurement Data System—Next Generation (FPDS–NG) for fiscal years 2008–2010. To evaluate the impact of changes to size standards on its loan programs, SBA analyzed internal data on its guaranteed loan programs for fiscal years 2008–2010.

SBA's ''Size Standards Methodology'' provides a detailed description of its analyses of various industry and program factors and data sources, and how the Agency uses the results to establish and revise size standards. In the proposed rule itself, SBA detailed how it applied its ''Size Standards Methodology'' to review and modify where necessary, the existing size standards for industries in NAICS Sector 53. SBA sought comments from the public on a number of issues about its ''Size Standards Methodology,'' such as whether there are alternative methodologies that SBA should consider; whether there are alternative or additional factors or data sources that SBA should evaluate; whether SBA's approach to establishing small business size standards makes sense in the current economic environment; whether SBA's application 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.

SBA sought comments on its proposal to increase size standards for 20 industries and one sub-industry in NAICS Sector 53 (Real Estate and Rental and Leasing) and retain the existing size standards for the remaining four industries in that Sector. Specifically, SBA requested comments on whether the size standards should be revised as proposed and whether the proposed revisions are appropriate. SBA also invited comments on whether its proposed eight fixed size standard levels are appropriate and whether it should adopt common size standards for several Industry Groups in NAICS Sector 53.

The SBA's analyses supported lowering existing receipts based standards for one industry. However, as SBA pointed out in the proposed rule, lowering size standards will reduce the number of firms eligible to participate in Federal small business assistance programs and this is counter to what the Federal government and SBA are doing to help small businesses. Therefore, SBA proposed to retain the current size standards for that industry and requested comments on whether the Agency should lower size standards for which its analyses might support lowering them.

Summary of Comments

SBA received eight comments on the proposed rule. These comments are summarized below.

Two commenters addressed SBA's proposed size standard for NAICS 532291, Home Health Equipment Rental. SBA had proposed to increase the size standard for that NAICS code from $7 million in average annual receipts to $30 million. Both commenters generally supported the SBA's proposed increase. One of the commenters stated the $7 million size standard has not kept up with changes in industry structure and the Federal marketplace and that more small businesses will become eligible for Federal government programs under the proposed, higher size standard, thereby helping both small businesses and the Federal government. However, both suggested that SBA adopt a 500-employee standard instead of the proposed $30 million receipts based size standard. Both argued that services provided under NAICS 532291 are similar to those under NAICS 339112 (Air and Gas Compressor Manufacturing), which has a 500-employee size standard. However, they did not provide any industry data and analyses supporting the similarities between the two industries. To support the recommendation for a 500-employee size standard for NAICS 532291, one of the commenters highlighted two Veterans Administration solicitations for the same service and product (oxygen supplies) for which the Agency used NAICS 532291 at one location and NAICS 339112 at another. The commenters argued such inconsistent practice would not occur if SBA adopted the 500-employee size standard for NAICS 532291. They added that the 500-employee size standard applies to all manufacturing industries as well as to SBA's non-manufacturer's rule. They also argued that employment is a more suitable and stable measure of business size as it is not influenced by inflation and changes in economic conditions.

SBA disagrees with the commenters' arguments that companies involved in NAICS 532291 are similar to those in NAICS 339112. NAICS 532291 comprises establishments primarily engaged in renting home-type health equipment, such as wheel chairs, hospital beds, oxygen tanks, walkers, and crutches, while NAICS 339112 comprises establishments primarily engaged in manufacturing medical, surgical, ophthalmic, and veterinary instruments and apparatus (except electrotherapeutic, electro-medical and irradiation apparatus), such as syringes, hypodermic needles, anesthesia apparatus, blood transfusion equipment, catheters, surgical clamps, and medical thermometers (*see www.census.gov/naics*). Two other related codes are NAICS 325120 (Industrial Gas Manufacturing) and NAICS 332420 (Metal Tank (Heavy Gauge) Manufacturing). NAICS 325120 includes manufacturing oxygen and NAICS 332420 includes manufacturing oxygen tanks. The Small Business Size Regulations require Federal agencies to designate the proper NAICS code and size standard in a solicitation, selecting the NAICS code which best describes the principal purpose of the product or service being acquired. *See* 13 CFR 121.402(b). Accordingly, if a solicitation is for renting health equipment (such as oxygen tanks), Federal agencies should apply NAICS 532291 and its corresponding size standard. Similarly, if a solicitation involves purchasing health equipment and supplies (such as oxygen tanks and oxygen), the contracting officers should apply an appropriate manufacturing NAICS code and its corresponding size standard. In a rental situation, the Federal government is procuring a service. On the other hand, if the Federal government is purchasing the products themselves, then the manufacturing NAICS codes and accompanying size standards apply. An entity that qualifies under the nonmanufacturer rule (13 CFR 121.406(b)) may also supply products it did not produce. However, it is important to note that the nonmanufacturer rule does not apply to service contracts. The regulations also provide that any interested party adversely affected by a NAICS code designation for a specific Federal procurement may appeal the designation to the Office of Hearings and Appeals. *See* 13 CFR 121.1102–121.1103.

For the reasons explained in its ''Size Standards Methodology,'' SBA uses employment as the measure of size for manufacturing industries and average annual receipts for most service industries, including all industries in NAICS Sector 53. SBA recognizes that employment is less influenced by inflationary factors than receipts, but it is not immune to changes in economic conditions. For example, businesses shed millions of employees during and after the recent economic recession. Because receipts are sensitive to inflation, SBA defines annual receipts as the average over a firm's three most recently completed fiscal years. *See* 13 CFR 121.104. In addition, SBA adjusts its monetary based size standards for inflation at least once every five years.

For the above reasons, SBA is not adopting the commenter's recommendation to adopt a 500-employee size standard for NAICS 532291. Instead, it is adopting the $30 million receipts based size standard, as proposed.

SBA received one comment concerning the proposed size standard for NAICS 531311, Residential Property Management. SBA had proposed to increase the size standard for this NAICS code from $2 million to $7 million in average annual receipts. Opposing the SBA's proposed $7 million size standard, the commenter suggested a much higher $15 million size standard for NAICS 531313. He argued that services offered by small businesses in this NAICS code are quite diverse and involve services from several industries within NAICS Subsectors 541 and 561, including NAICS 541310, 561622, 561710, 561720, 561730, and 561790. The commenter contended that most of these industries have size standards higher than $7 million. However, except for NAICS 561720, all of them have a $7 million size standard currently. Furthermore, except for NAICS 561710, current industry and Federal contracting data for those industries do not support a size standard higher than $7 million (*see* 77 FR 7490 (February 10, 2012) and 76 FR 63510 (October 12, 2011)). The commenter maintained that a higher size standard would enable his business to remain eligible for SBA's 8(a) Program; however, the commenter did not provide other information to support why $15 million is a more appropriate size standard for NAICS 531311 than the proposed $7 million. For the above reasons, SBA is adopting the proposed $7 million size standard for NAICS 531311, as proposed.

SBA received one comment on the proposed size standard for NAICS 531320, Offices of Real Estate Appraisers. The commenter supported SBA's proposed increase from the current $2 million to $7 million in average annual receipts. The commenter contended that the current size standard has both prevented small businesses from participating in government contracts and kept Federal agencies from receiving quality services to meet their needs. The commenter stated that both small businesses and the Federal government will benefit under the higher $7 million size standard. SBA is adopting the $7 million size standard, as proposed.

SBA received one comment concerning the proposed size standards for NAICS 532111, Passenger Car Rental, and NAICS 532112, Passenger Car Leasing. For both industries, SBA had proposed to increase the size standard from $25.5 million to $35.5 million, which is the highest level of receipts based size standards. Arguing that SBA's proposed increase to $35.5 million is inadequate and that it would not create a level playing field for small businesses, the commenter suggested increasing it to $150 million. He contended that his business and others with fewer than 500 employees are not dominant and should be able to qualify as small. He argued that SBA's current $25.5 million or proposed $35.5 million size standard for the rental car industry makes it difficult for small businesses to grow and develop and increase their market share. To support his argument, the commenter provided copies of testimony he presented at SBA's June 2005 Public Hearings on Size Standards and previous correspondence with SBA. His comment also included data on the rental car industry from 2000 to 2011, showing the increasing market dominance of the industry by the largest companies and high degree of industry concentration. In addition, the commenter argued that national networks operated by large companies make competition more limited and restrictive for his company and other local competitors.

SBA recognizes that although the proposed $35.5 million size standard would include 98 percent of firms in NAICS 532111 and 93 percent of firms in NAICS 532112, it includes a small percentage of total industry receipts. However, to be consistent with SBA's size standards methodology and with proposed and final rules for other NAICS Sectors that SBA has issued to date, $35.5 million is the highest receipts based size standards that SBA will propose or adopt. Thus, SBA is adopting the $35.5 million size standard for NAICS 532111, Passenger Car Rental and NAICS 532112, Passenger Car Leasing, as proposed.

SBA received a comment from an association representing the U.S. equipment rental industry. The association's comments concerned the proposed size standards for three NAICS codes: NAICS 532310 (General Rental Centers), NAICS 532412 (Construction, Mining and Forestry Machinery and Equipment Rental and Leasing), and NAICS 532490 (Other Commercial and Industrial Machinery and Equipment Rental and Leasing). The association fully supported SBA's proposal to increase the size standard for NAICS 532412 and NAICS 532490 from the current $7 million to $30 million. It also fully supported the SBA's proposal to establish a common $30 million size standard for all industries within NAICS Industry Group 5324, Commercial and Industrial Machinery and Equipment Rental and Leasing. However, the association opposed the SBA's proposal to retain the current $7 million size standard for NAICS 532310 and recommended the same $30 million size standard as proposed for the other two codes. To support its suggestion, the association argued that many rental companies maintain a wide variety of rental goods in their inventories to meet the needs of their customers and that they should be treated equally for SBA's size standards.

The association provided several reasons supporting the proposed increase to the size standard for NAICS 532412 and NAICS 532490. First, as it stated, the equipment rental industry has undergone significant structural changes, thereby warranting a significant increase to the current size standard. Second, as the association pointed out, the equipment rental industry has larger capital requirements and higher barriers to entry than the construction industry, and yet the size standard for most equipment rental industries is only $7 million as compared to $33.5 million for most construction related industries. Third, it added that since equipment rental companies derive a significant portion of their revenue from the construction equipment rental sector, the size standards for the equipment rental industries should be in line with those for construction industries. Fourth, the association noted that small businesses at the current $7 million size standard lack resources and equipment to compete with their larger counterparts and that they will be able to more effectively compete with large companies under the proposed, higher size standard.

SBA recognizes that many companies operating under NAICS 532310 may also be engaging in activities within one or more of the other equipment rental NAICS codes, including NAICS 532412 and NAICS 532490. However, based on the industry and Federal procurement data, there exist significant differences between the companies that are primarily engaged in NAICS 532310, General Rental Centers, and those that are primarily engaged in one of the industries within NAICS Industry Group 5324. For example, companies primarily engaged in industries within NAICS Industry Group 5324 have four times the average revenues and six times the average assets (proxy for start-up costs entry barriers) than companies primarily engaged in NAICS 532310. In addition, during fiscal years 2008 to 2010, Federal contracting dollars averaged less than $5 million for NAICS 532310 as compared to $675 million for industries within NAICS Industry Group 5324.

The association generally supported the five factors SBA evaluates in reviewing a size standard, but suggested giving more weight to average assets size and Federal procurement factor for the equipment rental industry. However, it did not provide any specific values.

For the above reasons, SBA is adopting the proposed $30 million common size standard for all industries within NAICS Industry Group 5324 (including NAICS 532412 and 532490) and the proposed $7 million size standard for NAICS 532310.

A national association representing recreational vehicle rental companies commented on the proposed size standard for NAICS 532120, Truck, Utility Trailer and RV (Recreational Vehicle) Rental and Leasing. SBA had proposed to increase the size standard for NAICS 532120 from $25.5 million to $35.5 million. The association fully supported the proposed increase and noted that this increase is consistent with the $30 million size standard that

SBA adopted for NAICS 441210, Recreational Vehicle Dealers, in 2010. It stated that changes in industry structure since SBA first established a size standard for the RV industry in the 1980s warranted an increase to the current size standard. The association argued that a higher size standard would create opportunity for businesses that have either exceeded or may be about to exceed the current size standard for Federal small business loans and contracts. Accordingly, SBA is adopting the proposed $35.5 million size standard for NAICS 532120.

SBA received two comments on its proposal to increase the size standard for NAICS 531210, Offices of Real Estate Agents and Brokers, from $2 million to $7 million. Both commenters generally supported the SBA's proposed increase to the size standard for NAICS 531210 as it would help small businesses better compete with large businesses, but they recommended a higher increase. Specifically, one commenter recommended at least $19 million, while the other suggested $10 million.

One commenter argued that there is a gap between the current $2 million, or proposed $7 million size standard, and revenues of large real estate brokerage firms receiving Federal contracts, thereby hurting small businesses with revenues above the size standard but way below the size of large firms. The commenter pointed out that the General Services Administration (GSA) recently awarded four prime contracts to large firms with revenues ranging from $225 million to $4 billion, but provided no information on whether those contracts could have been awarded to small businesses if the size standard were much higher than the current $2 million or proposed $7 million. He added that because of the low size standard, many otherwise small businesses must compete with large firms as a large business. As a result, the commenter stated, large brokerage firms continue to increase their Federal market share at the expense of qualified small businesses. The commenter contended that currently GSA does not have small business set aside contracts for real estate brokerage services, because of its perception that companies below the current $2 million size standard are too small to be sufficiently qualified to complete the work. He argued that raising the size standard to $19 million would increase the pool of eligible of small businesses for Federal contracting opportunities and encourage Federal agencies to set aside more contracts for small businesses. The commenter, who suggested a higher $10 million size standard for NAICS 531210, added that small firms must grow much larger to compete with largest firms in the industry, some of which exceed $1 billion in sales.

SBA recognizes that many mid-sized companies face challenges in the Federal market for brokerage and real estate services when they outgrow the size standard. Under the $7 million size standard, more than 98 percent of firms will qualify as small. SBA did not propose a higher standard because it is very concerned that ''smaller'' small firms cannot compete effectively with ''larger'' small businesses for Federal small business contracts when the size standards are too large, such as $19 million or $10 million as suggested by the commenters. SBA is also very aware that the small business share of Federal contracts in NAICS 531210 is very low under the current $2 million size standard. However, SBA estimates that about 5,700 more businesses above the current $2 million threshold will now qualify as small under the $7 million size standard. This will not only provide more opportunities for small businesses and increase small business share in the Federal market, but it will also encourage Federal agencies to set aside more contracts for small businesses because there will be a much larger pool of more qualified small businesses. Small businesses will also be able to grow and still maintain their small business status under the higher $7 million size standard.

One of the commenters argued that raising the size standard for NAICS 531210 to $19 million would make small businesses providing real estate services to the Federal government at par with other professional and property/facility related services, such as Architectural Services (NAICS 541310), Landscape Architectural Services (NAICS 541320), Engineering Services (NAICS 541330), Building Inspection Services (NAICS 541350), Marketing Consulting Services (NAICS 541613), and Advertising Services (NAICS 541810). However, the commenter did not provide any reasons or supporting information on why NAICS 531210 should have the same size standard as these industries. In fact, in the recently published Final Rule, Small Business Size Standards: Professional, Technical, and Scientific Services, SBA adopted the $7 million size standard for NAICS 541310, 541320 and 541350 (*see* 77 FR 7490 (February 10, 2012)).

One commenter suggested continuing the SBA's exclusion of funds received in trust for an unaffiliated third party from the calculation of annual receipts for NAICS 531210. SBA did not propose to discontinue the exclusion of funds received in trust for unaffiliated third parties, and is continuing the exclusion under this rule. In addition, the commenter proposed to add to the exclusion commissions paid to third party brokers, independent contractors, or third party firms. SBA is not adopting this recommendation for two reasons. First, commissions shared with third party brokers, independent contractors, or third party firms are not the same as the funds received in trust for an unaffiliated third party. When brokers or independent contractors work for or with a brokerage firm, the firm earns income by sharing a certain percentage of their commissions. SBA treats commissions paid out to brokers and independent contractors as costs of doing business, similar to subcontractor costs (such as fees paid to a third-party or independent agent), employee based costs (such as wages and payroll taxes), and material costs. For SBA's size standards, receipts means ''total income'' plus ''costs of goods sold.'' The definition of receipts (*see* 13 CFR 121.104) provides a number of exclusions, but ''cost of doing business'' is not one of them. Second, SBA is concerned that very large brokerage firms with hundreds of brokers and contractors may qualify as small if the firms are allowed to exclude commissions paid out to brokers and contractors, thereby causing competitive disadvantage to small firms with fewer brokers and contractors. Thus, SBA is not adopting the commenter's proposal.

For the above reasons, SBA is adopting the $7 million size standard for NAICS 531210, as proposed, and retaining the current definition of receipts without modification.

SBA received no comments on the SBA's proposal to revise size standards for other industries in NAICS Sector 53. SBA also received no comments on its proposal to retain the current size standards where analyses suggested lowering them.

All comments to the proposed rule are available for public review at *http://www.regulations.gov,* using RIN–3245–AG28 or docket number SBA–2011–0020.

Conclusion

Based on the analyses of relevant industry and program data and evaluation of public comments it received on the proposed rule, SBA has decided to increase the small business size standards for the 20 industries and one sub-industry in NAICS Sector 53 to the levels it proposed. Those industries and their revised size standards are shown in Table 1, Summary of Size Standards Revisions, below.

TABLE 1—SUMMARY OF SIZE STANDARDS REVISIONS

NAICS Codes	NAICS Industry title	Current size standard ($ million)	Revised size standard ($ million)
531110	Lessors of Residential Buildings and Dwellings	$7.0	$25.5
531120	Lessors of Nonresidential Buildings (except Miniwarehouses)	7.0	25.5
531190	Lessors of Other Real Estate Property	7.0	25.5
Except,	Leasing of Building Space to Federal Government by Owners	20.5	35.5
531210	Offices of Real Estate Agents and Brokers	2.0	7.0
531311	Residential Property Managers	2.0	7.0
531312	Nonresidential Property Managers	2.0	7.0
531320	Offices of Real Estate Appraisers	2.0	7.0
531390	Other Activities Related to Real Estate	2.0	7.0
532111	Passenger Car Rental	25.5	35.5
532112	Passenger Car Leasing	25.5	35.5
532120	Truck, Utility Trailer, and RV (Recreational Vehicle) Rental and Leasing	25.5	35.5
532210	Consumer Electronics and Appliances Rental	7.0	35.5
532220	Formal Wear and Costume Rental	7.0	19.0
532230	Video Tape and Disc Rental	7.0	25.5
532291	Home Health Equipment and Rental	7.0	30.0
532411	Commercial, Air, Rail, and Water, Transportation Equipment and Rental	7.0	30.0
532412	Construction, Mining and Forestry Machinery and Equipment Rental and Leasing	12.5	30.0
532420	Office Machinery and Equipment Rental and Leasing	25.5	30.0
532490	Other Commercial, and Industrial Machinery and Equipment Rental and Leasing	7.0	30.0
533110	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	7.0	35.5

For the reasons as stated above in this rule and in the proposed rule, SBA has decided to retain the current receipts based size standards for one industry for which analytical results suggested lower size standards. Not lowering size standards in NAICS Sector 53 is consistent with SBA's recent final rules on NAICS Sector 44–45, Retail Trade (75 FR 61597 (October 6, 2010)), NAICS Sector 72, Accommodation and Food Services (75 FR 61604 (October 6, 2010)), NAICS Sector 81, Other Services (75 FR 61591 (October 6, 2010)), NAICS Sector 54, Professional, Scientific and Technical Services (77 FR 7490 (February 10, 2012)), and NAICS Sector 48–49, Transportation and Warehousing (77 FR 10943 (February 24, 2012)). In each of those final rules, SBA adopted its proposal not to reduce small business size standards for the same reasons. SBA is also retaining the existing receipts based size standards for three industries for which the results supported them at their current levels.

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 final rule is not a ''significant regulatory action'' for purposes of Executive Order 12866. In order to help explain the need for this rule and the rule's potential benefits and costs, SBA is providing a Cost Benefit Analysis in this section of the rule. This is also not a ''major rule'' under the Congressional Review Act, 5 U.S.C. 800.

Cost Benefit Analysis

1. Is there a need for the regulatory action?

SBA believes that the revised changes to small business size standards for 20 industries and one sub-industry in NAICS Sector 53, Real Estate and Rental and Leasing, reflect changes in economic characteristics of small businesses in those industries and the Federal procurement market. 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 effectively, SBA establishes distinct definitions to determine which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegated to the SBA's Administrator the responsibility for establishing definitions for small business. The Act also requires that small business definitions vary to reflect industry differences. The Jobs Act requires the Administrator to review at least one-third of all size standards within each 18-month period from the date of its enactment, and review all size standards at least every five years thereafter. The **SUPPLEMENTARY INFORMATION** section of the May 13, 2011 proposed rule and this rule explained in detail 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 as a result of this rule is gaining eligibility for Federal small business assistance programs, including SBA's financial assistance programs, economic injury disaster loans, and Federal procurement opportunities intended for small businesses. Federal small business programs provide targeted opportunities for small businesses under SBA's various business development and contracting programs. These include the 8(a), small disadvantaged businesses (SDB), small businesses located in Historically Underutilized Business Zones (HUBZone), women owned small businesses (WOSB), and the service disabled veteran owned small business (SDVOSB) Programs. Other Federal agencies also may use SBA's size standards for a variety of regulatory and program purposes. These programs help small businesses become more knowledgeable, stable, and competitive. In the 20 industries and one sub-industry in NAICS Sector 53 for which SBA has decided to increase size standards, SBA estimates that about 13,000 additional firms will gain small business status and become eligible for these programs. That number is 5 percent of the total number of firms in industries in NAICS Sector 53 that have receipts based size standards. SBA estimates that this would increase the small business share of total industry receipts in those industries from 27 percent under the current size standards to 39 percent.

The benefits of increasing size standards to a more appropriate level will accrue to three groups: (1) Some businesses that are above the current size standards will gain small business status under the higher 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 higher 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.

Based on the data for fiscal years 2008–2010, more than 99 percent of total Federal contracting dollars spent in industries reviewed in this proposed rule were accounted for by the 20 industries and one sub-industry for which SBA is increasing size standards. The SBA estimates that additional firms gaining small business status in those industries under the revised size standards could potentially obtain Federal contracts totaling up to $75 million to $80 million per year under the small business, 8(a), SDB, HUBZone, WOSB, and SDVOSB Programs and other unrestricted procurements. The added competition for many of these procurements may also result in lower prices to the Government for procurements reserved for small businesses, although SBA cannot quantify this benefit.

Under SBA's 7(a) Business Loan and 504 Programs, based on the 2008–2010 data, SBA estimates that approximately 50 to 60 additional loans totaling $15 million to $20 million in new Federal loan guarantees could be made to the newly defined small businesses under the revised size standards. 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 for SBA's 7(a) and 504 Loan Programs for those applicants that do not meet the size standards for their industries. That is, under the Jobs Act, if a firm applies for a 7(a) or 504 loan but does not meet the size standard for its industry, it might still qualify if, including its affiliates, it has a tangible net worth that does not exceed $15 million and also has average net income after Federal income taxes (excluding any carry-over losses) for its preceding two completed fiscal years that do not exceed $5 million. Thus, increasing the size standards may result in an increase in small business guaranteed loans to small businesses in these industries, but it would be impractical to try to estimate the extent of their number and the total amount loaned.

Newly defined small businesses will also benefit from SBA's Economic Injury Disaster Loan Program. Since 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 all 13,000 newly defined small firms under the revised size standards could become active in Federal procurement programs, this may entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement opportunities, additional firms seeking SBA guaranteed lending programs, additional firms eligible for enrollment in the Central Contractor Registration's Dynamic Small Business Search database and additional firms seeking certification as 8(a) or HUBZone firms or those qualifying for small business, WOSB, SDVOSB, and SDB status. Among businesses in this group 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 are likely to be minimal because mechanisms are already in place to handle these administrative requirements.

The costs to the Federal Government may be higher on some Federal contracts under the higher revised size standards. 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 set-aside contracting will likely result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers. In addition, higher costs may result when additional full and open contracts are awarded to HUBZone businesses because of a price evaluation preference. The additional costs associated with fewer bidders, however, will likely be minor since, as a matter of law, procurements may be set aside for small businesses or reserved for the small business, 8(a), HUBZone, WOSB, or SDVOSB Programs only if awards are expected to be made at fair and reasonable prices.

The revised size standards may have some distributional effects among large and small businesses. Although SBA cannot estimate with certainty the actual outcome of gains and losses among small and large businesses, there are several likely impacts. There may be a transfer of some Federal contracts from large businesses to small 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 agencies may award more Federal contracts to HUBZone concerns instead of large businesses since HUBZone concerns may be eligible for price evaluation adjustments when they compete on full and open bidding opportunities. Similarly, currently defined small businesses may obtain fewer Federal contracts due to the increased competition from more businesses defined as small under the revised size standards. This transfer may be offset by more 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 small businesses under the existing size standards. The SBA cannot estimate with precision the potential distributional impacts of these transfers.

The revisions to the existing size standards for Sector 53, Real Estate and Rental and Leasing, 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 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 distributions impacts that relate to Executive Order 13563 is included above in the Cost Benefit Analysis.

In an effort to engage interested parties in this action, SBA has presented its methodology (discussed under **SUPPLEMENTARY INFORMATION** in the proposed rule and this rule) to various industry associations and trade groups. The SBA also met with various industry groups to obtain their feedback on its methodology and other size standards issues. The SBA also 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 presentations also included information on the latest status of the comprehensive size standards review and how interested parties can provide SBA with input and feedback on the 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). The SBA gave appropriate consideration to all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies in preparing the proposed rule for Sector 53.

Furthermore, when SBA issued the proposed rule, it provided notice of its publication to individuals and companies that had in recent years exhibited an interest by letter, email, or phone, in size standards for NAICS Sector 53 so they could comment.

The review of size standards in NAICS Sector 53, Real Estate and Rental and Leasing, is consistent with Section 6 of Executive Order 13563 calling for retrospective analyses of existing rules. The last overall review of size standards occurred during the late 1970s and early 1980s. Since then, except for periodic adjustments for monetary based size standards, most reviews of size standards were limited to a few specific industries in response to requests from the public and Federal agencies. The 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 all size standards to ensure that existing size standards have supportable bases and to revise them when necessary. In addition, 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 Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this final rule will not have substantial, direct effects 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 final 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 final rule would not impose any new reporting or record keeping requirements.

Final Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this rule may have a significant impact on a substantial number of small entities in NAICS Sector 53, Real Estate and Rental and Leasing. As described above, this rule may affect small entities seeking Federal contracts, SBA's 7(a) and 504 Guaranteed Loans, SBA's Economic Injury Disaster Loans, and various small business benefits under other Federal programs.

Immediately below, SBA sets forth a final regulatory flexibility analysis of this final 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 which 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 SBA's size standards for the Real Estate and Rental and Leasing industries had not been reviewed since the 1980s. Technological changes, productivity growth, international competition, mergers and acquisitions and updated industry definitions may have changed the structure of many industries in that Sector. Such changes can be sufficient to support a revision to size standards for some industries. Based on the analysis of the latest industry and program data available, SBA believes that the revised standards in this rule more appropriately reflect the size of businesses in those industries that need Federal assistance. Additionally, the Jobs Act requires SBA to review all size standards and make appropriate adjustments to reflect current data and market conditions.

(2) What are SBA's description and estimate of the number of small entities to which the rule will apply?

The SBA estimates that approximately 13,000 additional firms will become small because of increases in size standards in 20 industries and one sub-industry in NAICS Sector 53. That represents 5 percent of total firms in industries in that Sector that have receipts based size standards. This will result in an increase in the small business share of total industry receipts in those industries from about 27 percent under the current size standards to nearly 39 percent under the revised size standards. The SBA does not anticipate a significant competitive impact on smaller businesses in these industries. The revised size standards will enable more small businesses to retain their small business status for a longer period. Under current size standards, many small businesses may have lost their eligibility or found it difficult to compete with companies that are significantly larger than they are and this final rule attempts to correct that impact. The SBA believes these changes will have a positive impact for existing small businesses and for those that have either exceeded or are about to exceed current size standards.

(3) What are the projected reporting, record keeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?

Revising size standards does 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. Revising size standards alters the access to SBA programs that are designed to 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 section 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. 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 or revising 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 (*see* 13 CFR 121.903). 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 existing system 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 reasons set forth in the preamble, SBA amends 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, amend the table ''Small Business Size Standards by NAICS Industry'' as follows:

■ a. Under the heading Sector 53 Real Estate and Rental and Leasing, revise the entries for ''531110'', ''531120'', ''531190'', ''Except'', ''531210'', ''531311'', ''531312'', ''531320'', ''531390'', ''532111'', ''532112'', ''532120'', ''532210'', ''532220'', ''532230'', ''532291'', ''532411'', ''532412'', ''532420'', ''532490'', and ''533110'' to read as follows:

■ b. Revise footnote 9 as shown below after the table.

§ 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
*	* * * * *		*
531110	Lessors of Residential Buildings and Dwellings	$25.5	
531120	Lessors of Nonresidential Buildings (except Miniwarehouses)	25.5	
*	* * * * *		*
531190	Lessors of Other Real Estate Property	25.5	
Except,	Leasing of Building Space to Federal Government by Owners [9]	[9] 35.5	
531210	Offices of Real Estate Agents and Brokers [10]	[10] 7.0	
531311	Residential Property Managers	7.0	
531312	Nonresidential Property Managers	7.0	
531320	Offices of Real Estate Appraisers	7.0	
531390	Other Activities Related to Real Estate	7.0	
*	* * * * *		*
532111	Passenger Car Rental	35.5	
532112	Passenger Car Leasing	35.5	
532120	Truck, Utility Trailer, and RV (Recreational Vehicle) Rental and Leasing	35.5	
532210	Consumer Electronics and Appliances Rental	35.5	
532220	Formal Wear and Costume Rental	19.0	
532230	Video Tape and Disc Rental	25.5	
532291	Home Health Equipment Rental	30.0	
*	* * * * *		*
532411	Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing	30.0	
532412	Construction, Mining and Forestry Machinery and Equipment Rental and Leasing	30.0	
532420	Office Machinery and Equipment Rental and Leasing	30.0	
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing	30.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS Codes	NAICS U.S. Industry title	Size standards in millions of dollars	Size standards in number of employees
* *	* * *	*	*
533110	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	35.5	
* *	* * *	*	*

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Footnotes

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9. NAICS code 531190—Leasing of building space to Federal Government by Owners: For Government procurement, a size standard of $35.5 million in gross receipts applies to the owners of building space leased to the Federal Government. The standard does not apply to an agent.

* * * * *

Dated: June 22, 2012.

Karen G. Mills,

Administrator.

[FR Doc. 2012–23389 Filed 9–21–12; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG30

Small Business Size Standards: Health Care and Social Assistance

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The United States Small Business Administration (SBA) is increasing the small business size standards for 28 industries in North American Industry Classification System (NAICS) Sector 62, Health Care and Social Assistance, and retaining the current standards for the remaining 11 industries in that Sector. As part of its ongoing comprehensive review of all size standards, SBA evaluated every industry in NAICS Sector 62 to determine whether the existing size standards should be retained or revised.

DATES: This rule is effective October 24, 2012.

FOR FURTHER INFORMATION CONTACT: Jorge Laboy-Bruno, Economist, Size Standards Division, by phone at (202) 205–6618 or by email at *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

To determine eligibility for Federal small business assistance programs, SBA establishes small business size definitions (referred to as size standards) for private sector industries in the United States. SBA's existing size standards use two primary measures of business size—average annual receipts and number of employees. Financial assets, electric output and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC), 7(a), and the Certified Development Company (CDC or 504) Loan Programs determine small business eligibility using either the industry based size standards or alternative net worth and net income based size standards. At the start of the current comprehensive SBA's size standards review, there were 41 different size levels, covering 1,141 NAICS industries and 18 sub-industry activities (*i.e.,* ''exceptions'' in SBA's table of size standards). Of these, 31 were based on average annual receipts, seven based on number of employees, and three 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 comprehensive review of size standards occurred during the late 1970s and early 1980s. Since then, most reviews of size standards were 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. The latest inflation adjustment to size standards was published in the **Federal Register** on July 18, 2008 (73 FR 41237).

SBA recognizes that changes in industry structure and the Federal marketplace since the last overall review 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 determine whether existing size standards have supportable bases relative to the current data, and to revise them, where 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 review 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 is 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 related industries on a Sector by Sector basis.

As part of SBA's comprehensive review of size standards, the Agency evaluated every industry in NAICS Sector 62, Health Care and Social Assistance, to determine whether the existing size standards should be retained or revised. On February 24, 2012, SBA published a proposed rule in the **Federal Register** (77 FR 11001) seeking public comment on its proposal to increase the size standards for 28 industries in that Sector. The comment period ended on April 24, 2012.

SBA has recently developed a ''Size Standards Methodology'' for establishing, reviewing and modifying size standards, where necessary. SBA has published the document on its Web site at *www.sba.gov/size* for public review and comment and also included it as a supporting document in the electronic docket of the February 24, 2012 proposed rule at *www.regulations.gov.*

In evaluating an industry's size standard, SBA examines its characteristics (such as average firm size, startup costs, industry competition, and distribution of firms by size) and the level and small business share of