

Rules and Regulations

Federal Register

Vol. 77, No. 185

Monday, September 24, 2012

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245-AG29

Small Business Size Standards: Educational Services

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 nine industries in North American Industry Classification System (NAICS) Sector 61, Educational Services, and retaining the current size standards for the remaining eight industries and one sub-industry (“exception”) in this Sector. As part of its ongoing comprehensive review of all size standards, SBA evaluated every industry in NAICS Sector 61 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: 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 also 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 small business 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. SBA last conducted a comprehensive review of size standards 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 61, Educational Services, to determine whether the existing size standards should be retained or revised. On November 15, 2011, SBA published a proposed rule in the **Federal Register** seeking public comment on its proposal to increase the size standards for nine industries in NAICS Sector 61. The proposed rule was one of the rules that will examine industries grouped by a NAICS Sector.

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 November 15, 2011 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 61, 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 contract dollars in each of those industries using the data from the Federal Procurement Data System—Next Generation (FPDS-NG) for fiscal years 2008 to 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 to 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 derive size standards. In the proposed rule, SBA detailed how it applied its "Size Standards Methodology" to review, and modify, where necessary, the existing standards for industries in NAICS Sector 61. 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 also sought comments on its proposal to increase the size standards for nine industries and retain the existing size standard for the remaining eight industries and one sub-industry ("exception") in NAICS Sector 61. 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 some industries in NAICS Sector 61.

SBA's analyses supported lowering existing size standards for six industries and one sub-industry ("exception" to NAICS 611519, Job Corps Centers). However, as SBA explained in the proposed rule, lowering size standards would reduce the number of firms eligible to participate in Federal small business assistance programs and would run counter to what the Federal government and SBA are doing to help small businesses and create jobs. Therefore, SBA proposed to retain the current size standards for those industries and requested comments on whether the Agency should lower size standards for those six industries and one sub-industry for which its analyses might support lowering them.

Summary of Comments

There were four comments from individuals and businesses on SBA's proposed size standards changes for NAICS Sector 61. Two of the comments were on its proposal to retain the current size standard for NAICS 611512,

Flight Training, while another was on the proposal to retain the current size standard for Job Corps Centers, which is an exception to NAICS 611519, Other Technical and Trade Schools. One was a general comment supporting the SBA's methodology and proposed size standards for NAICS Sector 61. These comments are summarized below.

NAICS 611512, Flight Training

Two commenters opposed SBA's proposal to maintain the current \$25.5 million receipts based size standard for NAICS 611512, Flight Training, and recommended a higher size standard. One recommended \$33 million, while the other recommended at least \$35.5 million, preferably \$50 million. The second commenter also proposed an alternative employee based size standard of 1,000 employees. Except for information on a few recent solicitations and a general description of types of services to be performed for Federal contracts within this NAICS code, the commenters offered no alternative industry data or analyses to support their recommendations.

To support the argument for a higher size standard, the first commenter argued that large flight training contracts, previously reserved for full and open competition, are being set aside for small businesses. This has caused, according to the commenter, small incumbent firms to exceed the current size standard with a few contract awards. The commenter added that, with revenues from two small business set aside contracts the commenter's firm is currently performing and one new set aside contract it has recently competed, the firm will exceed the current size standard, thereby making it ineligible to compete as a small business for future set aside contracts in NAICS 611512, unless the size standard is increased. The commenter maintained that this will also cause significant turmoil for the Federal government because the incumbent small businesses will never be able to compete on subsequent bidding opportunities. The commenter stated that the current size standard for NAICS 611512 is counter to the idea of promoting small businesses through set aside contracts. The commenter concluded that given the increased size and scope of small business set aside contracts in NAICS 611512 the current size standard should be increased, not decreased, as shown by SBA's analysis.

In response to the above comment, SBA evaluated the FPDS-NG and Central Contractors Registration (CCR) data for fiscal years 2008 to 2010. The data showed that 60 percent of firms

receiving new Federal contracts annually within NAICS 611512 were small businesses. Similarly, about 37 percent of all new contracts and 21 percent of total contract dollars in NAICS 611512 were awarded to small businesses. These statistics demonstrate substantial small business participation in the Federal market under the current size standard. The data also suggest that there already exists a sufficient pool of small businesses from which the Federal government can draw for new set aside contracts, even if some small incumbent businesses outgrow the size standard. Moreover, it should be noted that more than 97 percent of all firms in NAICS 611512 are small under the current \$25.5 million size standard. Based on these data and SBA's evaluation of industry and Federal procurement factors as discussed in the proposed rule, the Agency believes that the current \$25.5 million is an appropriate size standard for NAICS 611512. In fact, SBA's analyses of the latest industry and Federal procurement data available would have supported a lower \$19 million size standard for NAICS 611512. However, in light of current economic conditions as explained in the proposed rule, SBA proposed to retain it at the current level. If the size standard were increased to \$33 million from the current \$25.5 million, as recommended by the commenter, the 2007 Economic Census data for NAICS 611512 show that only a few relatively large firms would benefit, likely at the expense of many smaller and startup businesses that need the Federal assistance the most. This result was also confirmed using the data on firms that were awarded Federal contracts within this industry during fiscal years 2008 to 2010. Thus, SBA is not adopting the commenter's recommendation for a \$33 million size standard for NAICS 611512.

The second commenter supported the size standards review for NAICS Sector 61, but similarly disagreed with SBA's proposal not to increase the size standard for NAICS 611512. The commenter stated that SBA's proposal not to increase the size standard for this industry is at odds with economic characteristics of the military training services, mission crew training, aircrew training, and courseware development industries. The commenter contended that the traditional definition of NAICS 611512 does not reflect several activities typically required for flight training contracts, including simulator based training, instructional training, simulator maintenance, courseware development and application, enhanced

learning through Learning Management Systems (LMS), and information technology (IT) and facilities support. The commenter claimed that these contracts may also include modification to the aircraft platforms and simulators. The commenter argued that the size standard for NAICS 611512 is complex and it, therefore, requires additional review to provide a more favorable competitive environment for small businesses to grow and win Federal contracts within this industry. Besides referring to several solicitations assigned NAICS 611512 and NAICS 336413, the commenter did not offer alternative industry data or analyses to support his arguments. The commenter recommended that SBA revise its proposal to address the complexity and economic characteristics of this industry through one or more of the following:

1. Convert the NAICS 611512 size standard from annual receipts to at least 1,000 employees; or
2. Increase the existing size threshold from \$25.5 million to \$35.5 million, which is the highest proposed level for NAICS Sector 61; or
3. Create a new NAICS code "Aircrew Training and Support" in NAICS Sector 61 with a size threshold of at least \$50 million in average annual receipts; or
4. Create a new NAICS code "Aircrew Training and Support" in NAICS Sector 61 with a size standard of at least 1,000 employees; or
5. Create an exception "Aircrew Training and Support" within NAICS 611512 for Federal procurement with a size standard of at least \$35.5 million in annual receipts or 1,000 employees.

The commenter provided several reasons for his recommendations. First, the commenter contended that NAICS 611512, Flight Training, is similar to NAICS 336413, Other Aircraft Part and Auxiliary Equipment Manufacturing and should have the same 1,000-employee size standard as that for NAICS 336413. To support the argument, the commenter added that due to a low size standard for NAICS 611512, many contracting officers have used NAICS 336413 and its 1,000-employee size standard for Federal contracts involving aircrew training and related logistic and support services. Second, the commenter maintained that the value of Federal contracts has created unintended ceilings for competition. Third, the commenter purported that SBA's methodology does not consider relevant Federal contracting factors. Fourth, the commenter argued that SBA has not considered the complexity of multiple services required by the military to support a "Flight Training" contract.

SBA addresses each of the commenter's recommendations above, as follows:

1. Providing Flight Training Services is a service function, not manufacturing, and SBA does not apply employee based size standards to NAICS codes that represent services industries. SBA's experience and analyses generally support receipts based size standards for services industries. See SBA's Methodology, cited elsewhere in this rule.

2. SBA's analysis of this industry does not support a size standard over \$25.5 million, as detailed in the proposed rule (see 76 FR 70667 (November 15, 2011)). Additional information that the commenter supplied did not support anything higher than that either.

3. & 4. SBA does not establish NAICS codes. Rather, only the U.S. Office of Management and Budget together with the U.S. Bureau of the Census defines what is and what is not included within any NAICS Industry. Recommendations regarding NAICS industry definitions should be directed to the Office of Management and Budget, which is responsible for establishing, modifying, or updating an NAICS code.

5. As stated above, the data do not support increasing the size standard for this industry beyond the current \$25.5 million, and an employee based size standard is not appropriate. SBA has in the past established exceptions for a limited number of NAICS codes. However, that is not applicable to this industry because SBA believes the current size standard is already appropriate.

SBA disagrees with the commenter's contention that NAICS 611512 is similar to NAICS 336413. NAICS 611512 includes establishments primarily engaged in offering aviation and flight training, while NAICS 336413 comprises establishments primarily engaged in (1) manufacturing aircraft parts or auxiliary equipment (except engines and aircraft fluid power subassemblies), and/or (2) developing and making prototypes of aircraft parts and auxiliary equipment (such as crop dusting apparatus, armament racks, inflight refueling equipment, and external fuel tanks) (see www.census.gov/naics). Accordingly, the activities that are required for flight training contracts, including, according to the commenter, simulator based training, instructional training, courseware development and application, enhanced learning through LMS, and IT and facilities support fall under NAICS 611512, not NAICS 336413. The industry data also demonstrates that these two industries

are significantly different. For example, based on the 2007 Economic Census, firms in NAICS 336413 average about \$39 million in receipts and 145 employees, as compared to \$2.6 million and 18 employees for NAICS 611512.

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. Primary consideration is given to the industry descriptions in the NAICS United States Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value. See 13 CFR 121.402(b). Therefore, if the principal purpose of the procurement is "flight training," then NAICS 611512 is the code that the contracting officer must apply. Similarly, if a solicitation involves the acquisition of aircraft parts, auxiliary, or other equipment, the contracting officer must apply an appropriate manufacturing NAICS code and the corresponding size standard. SBA's regulations also provide that any interested party adversely affected by a NAICS code designation for a specific Federal procurement may appeal the designation to SBA's Office of Hearings and Appeals. See 13 CFR 121.1102-1103.

The commenter argued that contract values have created unintended ceilings for small business participation in the Federal market for flight training services. On the contrary, size standards are intended to provide ceilings; they determine the maximum size of a business that can compete as a small business, but do not affect the size of the contracts themselves. The commenter added that increased complexity and scope of services required for flight training contracts have rendered many small businesses unable to compete under the current size standard. To accurately reflect increased complexity and scope of multiple services required for flight training contracts, the commenter recommended a new "Aircrew Training and Support" NAICS code and a separate size standard. SBA believes most of the services required for flight training contracts, as cited above by the commenter, are not necessarily new activities warranting a new NAICS code or an exception under NAICS 611512; rather they are new

tools and methods for delivering flight training services as defined under NAICS 611512.

In response to the commenter's argument that small businesses under the current \$25.5 million are not able to compete for Federal contracts in NAICS 611512, SBA evaluated recent data from FPDS-NG and CCR. The data showed that small business account for 60 percent of all firms winning Federal contracts, 37 percent of all new contracts, and 21 percent of total contract dollars in NAICS 611512. Thus, small businesses have been quite successful in receiving Federal contracts under the current size standard. The commenter's firm itself appeared to be very successful in getting several small business set aside contracts under the current size standard.

SBA disagrees with the commenter's allegation that the methodology it used to evaluate size standards for NAICS Sector 61 does not consider relevant Federal contracting factors. As explained in the proposed rule as well as in SBA's "Size Standards Methodology" White Paper, Federal contracting is one of the five primary factors SBA evaluates when reviewing a size standard. Specifically, for each of the industries averaging \$100 million or more in Federal contracts annually, SBA compares the small business share of total Federal contracts with the small business share of total industry receipts. If the difference between the former and latter is between 10 percent and 30 percent, SBA designates a size standard one fixed level higher than the current one. If that difference is more than 30 percent, SBA designates a size standard two levels above the current size standard. Accordingly, the Federal contracting factor supported a higher \$30 million size standard for NAICS 611512, as compared to the current \$25.5 million. Based on all factors combined, the calculated size standard was \$19 million. However, in light of current economic conditions, SBA proposed to retain the current size standard.

The commenter argued that SBA did not consider the complexity of multiple services required to support "Flight Training" contracts. SBA disagrees. As noted above, most of activities that are required for flight training contracts, including, according to the commenter, simulator based training, instructional training, courseware development and application, and enhanced learning through LMS are part of NAICS 611512. SBA believes the industry data from the Economic Census and procurement data from FPDS-NG that it evaluated to examine this industry already reflect

those activities. Moreover, the current size standard, which is one of the highest in NAICS Sector 61, also reflects the characteristics of the flight training industry.

SBA recognizes that, as in most other industries, small businesses in NAICS 611512 face challenges in the Federal marketplace when they outgrow the size standard. As stated above, more than 97 percent of firms already qualify as small under the current \$25.5 million size standard. SBA is concerned that "smaller" small and startup companies would not be able to compete effectively with "larger" small businesses for Federal small business contracts if the size standards were too high, such as \$35.5 million or \$50 million in average annual receipts, or 1,000 employees, as recommended by the commenter. At these levels, only a few larger firms are likely to benefit, mostly at the expense of many smaller businesses. For example, based on the 2007 Economic Census tabulation, only three firms would benefit if SBA increased the size standard to \$35.5 million and three more firms would benefit if it increased to \$50 million. At 1,000 employees, the 2007 Economic Census data show that all but 12 of the largest firms, possibly including some of the dominant firms with annual receipts of several hundred million dollars, would qualify as small. The data on firms receiving Federal contracts within NAICS 611512 during the fiscal years 2008 to 2010 also confirmed that only a few large firms would benefit if the size standard were increased to those levels. The commenter argued that those higher size standards would help small businesses to compete for Federal contracts for several years and allow them to grow and develop necessary expertise. However, given that 97 percent of firms in NAICS 611512 have less than \$25.5 million in receipts and fewer than 100 employees, SBA believes that such high size standards would adversely affect the ability of many small businesses to compete for Federal opportunities in that industry.

This commenter also recommended that SBA impose a temporary moratorium on calculation of average annual receipts based on 2008, 2009, and 2010. In other words, the commenter recommended excluding year 2011 from the calculation, although he did not justify why. SBA does not adopt this recommendation. For SBA's size standards, annual receipts of a concern means the average annual receipts over its most recently completed three fiscal years (*see* 13 CFR 121.104(c)). Accordingly, average annual receipts for 2012 must be an

average over 2011, 2010, and 2009. Selectively excluding the most recent year or any other year from the calculation for one or few industries, as suggested by the commenter, will cause widespread inconsistency in how businesses calculate their average annual receipts to determine if they are small. In addition, this would more likely benefit successful small businesses that have exceeded the size standard by allowing them to prolong their small business eligibility, thereby reducing opportunities for other small and startup businesses.

For the above reasons, SBA is not adopting any of the alternatives recommended by the commenter. Instead the Agency is adopting \$25.5 million as proposed. SBA has also retained the current method of calculating average annual receipts based on the firm's most recently completed three fiscal years.

Job Corps Centers

SBA received one comment on its proposal to retain the current size standard for Job Corps Centers, which is an exception to NAICS 611519, Other Technical and Trade Schools. Citing its success in getting Federal contracts as a small business prime contractor over the years, the commenter argued that the commenter's firm will exceed the current \$35.5 million size standard for Job Corps Centers within the next 2-3 year period, making it no longer eligible to re compete for any of the four Job Corps Centers it now operates. The commenter added that there is no "graduation plan or process" in place allowing small businesses to compete as an incumbent contractors for Centers they operate when they exceed the current size standard. The commenter recommended that the size standard should be increased to \$50 million. However, the commenter offered no alternative data on or analyses of the Job Corps Centers industry segment supporting his recommendation. While SBA recognizes the challenges small businesses face when they exceed the size standard for their industries, the agency is not adopting the commenter's recommendation for two reasons. First, only one firm would benefit if the size standard were increased from \$35.5 million to \$50 million. Second, this will also cause adverse competitive impact on firms operating Job Corps Centers as small business under the current size standard. SBA's regulation has no "graduation plan" for any industry for Government contracting purposes, when a firm exceeds the size standard. Thus, SBA is adopting \$35.5 million, as proposed.

The fourth commenter fully supported the SBA's size standards methodology used to derive the proposed size standards for NAICS Sector 61. The commenter also fully endorsed the adoption of all size standards, as proposed. The commenter recommended October 1, 2012 as the effective date, so that the Federal Government and industry will have enough time to prepare for the change. SBA will publish the final rule as soon

as the necessary review and clearance as required under the rulemaking process is complete. The revised size standards will become effective after 30 days from the date of publication.

All comments to the proposed rule are available for public review at <http://www.regulations.gov>, using RIN 3245-AG29 or docket number SBA-2011-0021.

Conclusion

Based on the analyses of relevant industry and program data and public comments it received on the proposed rule, SBA has decided to increase the small business size standards for the nine industries in NAICS Sectors 61 to the levels it proposed. Those industries and their revised size standards are shown in Table 1, Summary of Revised Size Standards in NAICS Sector 61, below.

TABLE 1—SUMMARY OF REVISED SIZE STANDARDS IN NAICS SECTOR 61

NAICS Code	NAICS Industry title	Current size standard (\$ million)	Revised size standard (\$ million)
611110	Elementary and Secondary Schools	7.0	10.0
611210	Junior Colleges	7.0	19.0
611310	Colleges, Universities and Professional Schools	7.0	25.5
611420	Computer Training	7.0	10.0
611430	Professional and Management Development Training	7.0	10.0
611519	Other Technical and Trade Schools	7.0	14.0
611630	Language Schools	7.0	10.0
611699	All Other Miscellaneous Schools and Instruction	7.0	10.0
611710	Educational Support Services	7.0	14.0

For the reasons as stated above in this rule and in the proposed rule, SBA has decided to retain the current size standards for six industries and one sub-industry for which analytical results suggested lower size standards. Not lowering size standards in NAICS Sector 61 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 size standards for two 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 nine industries in NAICS Sector 61, Educational Services, 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. The Small Business Act delegated to SBA's Administrator the responsibility for establishing small businesses definitions (15 U.S.C. 632(a)). 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 sections of the November 15, 2011 proposed rule and this final

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 final rule is gaining eligibility for Federal small business assistance programs, including SBA's financial assistance programs and Federal procurement opportunities reserved for small businesses. Federal small business programs provide targeted opportunities for small businesses under various SBA's business development programs, such as the 8(a) Business Development program and programs benefitting small businesses located in Historically Underutilized Business Zones (HUBZone), women owned small businesses (WOSB), and service disabled veteran owned small businesses (SDVOSB). Other Federal agencies also may use SBA size standards for a variety of regulatory and program purposes. These programs help small businesses become more knowledgeable, stable and competitive. In the nine industries in NAICS Sector 61 for which SBA has decided to increase size standards, SBA estimates that about 1,500 firms exceeding the current size standards will gain small business status and become eligible for these programs. That number is 2.1 percent of the total number of firms that

are currently classified as small in all industries in NAICS Sector 61. SBA estimates that this would increase the small business share of total industry receipts in those industries from about 18 percent under the current size standards to 23 percent.

The benefits of increasing size standards to a more appropriate level will accrue to three groups in the following ways: (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.

For the November 15, 2011 proposed rule, SBA analyzed FPDS-NG data for fiscal years 2007 to 2009 and found that 88 percent of Federal contracting dollars in Sector 61 were accounted for by those nine industries for which SBA has increased size standards. This also held true in SBA's updated analysis using the FY 2008-2010 FPDS-NG data. SBA estimates that additional firms gaining small business status in those industries under the revised size standards could potentially obtain Federal contracts totaling between \$20 million and \$25 million annually through the 8(a), 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) and 504 Loan Programs, based on the data for fiscal years 2008 to 2010, SBA estimates that around 16 to 20 additional loans totaling between \$3 million and \$4 million in new Federal loan guarantees will be made for 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 SBA's 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 will likely result in an increase in small business guaranteed loans to small businesses in these industries, but it is impractical to try to estimate the extent of their number and the total amount loaned.

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

To the extent that all 1,500 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's 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 61, Educational Services, 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 distributional 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 final rule) to various industry associations and trade groups. SBA also met with various industry groups to obtain their feedback on its methodology and other size standards issues. 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). 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 and this final rule for Sector 61.

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 61 so they could comment.

The review of size standards in NAICS Sector 61, Educational Services, 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. 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 final rule may have a significant impact on a substantial number of small entities in NAICS Sector 61, Educational Services. As described above, this final rule may affect small entities seeking Federal contracts, SBA's 7(a), 504 and 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 in NAICS Sector 61, Educational Services, 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?

SBA estimates that approximately 1,500 additional firms will become small because of increases in size standards in nine industries in NAICS Sector 61. That number is 2.1 percent of the total number of firms that are currently classified as small in all industries in NAICS Sector 61. This will result in an increase in the small business share of total industry receipts in those industries from about 18 percent under the current size standards to 23 percent under the revised size standards. 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. 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?

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 Federal 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 (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. The possible alternative size standards considered for the individual industries within NAICS Sector 61 are discussed in the supplementary

information to the proposed rule and this final rule.

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), 636(b), 662, 694a(9).

■ 2. In § 121.201, in the table, revise the entries for “611110,” “611210,” “611310,” “611420,” “611430,” “611519,” “611630,” “611699,” and “611710,” 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
611110	Elementary and Secondary Schools	10.0	
611210	Junior Colleges	19.0	
611310	Colleges, Universities and Professional Schools	25.5	
611420	Computer Training	10.0	
611430	Professional and Management Development Training	10.0	
611519	Other Technical and Trade Schools	14.0	
611630	Language Schools	10.0	
611699	All Other Miscellaneous Schools and Instruction	10.0	
611710	Educational Support Services	14.0	

Dated: June 22, 2012.

Karen G. Mills,
Administrator.

[FR Doc. 2012-23373 Filed 9-21-12; 8:45 am]

BILLING CODE 8025-01-P

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.

FOR FURTHER INFORMATION CONTACT: Jon Haitsuka, Program Analyst, Size Standards Division, (202) 205-6618 or sizestandards@sba.gov.

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 every 18-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