

## 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
812922 .....	One-Hour Photo Finishing .....	\$14.0 .....	.....
812930 .....	Parking Lots and Garages .....	35.5 .....	.....
* .....	* .....	* .....	* .....
813211 .....	Grantmaking Foundations .....	30.0 .....	.....
813212 .....	Voluntary Health Organizations .....	25.5 .....	.....
813219 .....	Other Grant Making and Giving Services .....	35.5 .....	.....
813311 .....	Human Rights Organizations .....	25.5 .....	.....
813312 .....	Environment, Conservation and Wildlife Organizations .....	14.0 .....	.....
* .....	* .....	* .....	* .....
813920 .....	Professional Organizations .....	14.0 .....	.....
* .....	* .....	* .....	* .....

Dated: September 10, 2010.

**Marie C. Johns,**

*Deputy Administrator.*

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 121

RIN 3245-AF69

#### Small Business Size Standards: Retail Trade

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The United States Small Business Administration (SBA) is modifying 47 small business size standards for industries in North American Industry Classification System (NAICS) Sector 44-45, Retail Trade, and retaining the current standards for the remaining industries in the Sector. In this final rule, SBA is increasing 46 of the size standards and converting the measure of size for one industry (NAICS 441110, New Car Dealers) from annual receipts to number of employees. As part of its ongoing initiative to review all size standards, SBA has evaluated every industry in NAICS Sector 44-45 to determine whether the existing size standards should be retained or revised. This rule also modifies SBA's Small Business Size Regulations to clarify that an NAICS code that represents a Wholesale Trade (NAICS Sector 42) or Retail Trade (NAICS Sector 44-45) Industry shall not be used for the Federal government's procurement of supplies.

**DATES:** This rule is effective November 5, 2010.

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#### 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—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) and the Certified Development Company (CDC) Programs determine small business eligibility using either the industry based size standards or net worth and net income based size standards. Currently, SBA's size standards consist of 45 different size levels, covering 1,141 NAICS industries and 17 sub-industry activities. Of these size levels, 32 are based on average annual receipts, eight are based on number of employees, and five are based on other measures. In addition, SBA has established 11 other size standards for its financial and procurement programs.

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. The last overall review of size standards occurred during the late 1970s and early 1980s. Since then, most reviews of size standards have been limited to in-depth analyses of 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 over time have rendered existing size standards for some industries no longer supportable by current data. Accordingly, SBA has begun a comprehensive review of its size standards to determine whether existing size standards have supportable bases relative to the current data and, where necessary, to make revisions to existing size standards. Rather than review all size standards at one time, SBA has taken a more manageable approach to reviewing a group of related industries within an NAICS Sector. SBA expects to complete its review of all NAICS Sectors in two years.

As part of its ongoing effort to review all small business size standards, SBA evaluated every industry in NAICS Sector 44-45, Retail Trade, to determine whether the existing size standards should be retained or revised, and published a proposed rule for public comment in the October 21, 2009 issue of the **Federal Register** (74 FR 53924) to increase the size standards for 47 industries in that Sector. The proposed rule was one of a series of proposals that will examine industries grouped by an NAICS Sector. SBA also published concurrently in the same October 21, 2009 issue of the **Federal Register** proposed rules to increase small business size standards for five industries in NAICS Sector 72, Accommodation and Food Services (74 FR 53913) and for 18 industries in NAICS Sector 81, Other Services (74 FR

53941). Similarly, SBA is publishing final rules on NAICS Sector 72 and NAICS Sector 81 elsewhere in this issue of the **Federal Register**.

In addition, SBA established its "Size Standards Methodology" for reviewing small business size standards and modifying them, where necessary. SBA published in the October 21, 2009 issue of the **Federal Register** (74 FR 53940) a notice of its availability, for public comments, on its Web site at <http://www.sba.gov/contractingopportunities/officials/size/index.html>. In addition, SBA has placed a copy of its "Size Standards Methodology" in the electronic docket of the proposed rule and is available there as well.

In evaluating an industry's size standard, SBA examines the industry's characteristics (such as average firm size, startup costs, industry competition and distribution of firms by size), Federal Government contracting trends, impact on SBA financial assistance programs, and dominance in field of operations. SBA analyzed the characteristics of each industry in NAICS Sector 44–45 mostly using a special tabulation obtained from the U.S. Bureau of the Census from its 2002 Economic Census (the latest available). SBA also evaluated Federal contracting trends using the data from the Federal Procurement Data System—Next Generation (FPDS–NG) for fiscal years 2006–2008. Although FPDS–NG contains data representing Federal procurement activity in Sector 44–45 and SBA reviewed it, the procurement data are not relevant to SBA's action in this final rule because retail trade size standards do not apply to Federal contracting. Rather, the 500 employee nonmanufacturer rule applies to the Federal government's procurement of goods and supplies. (13 CFR 121.406(b)). Therefore, procurement data do not form a basis on which to establish, evaluate or modify small business size standards in this Sector.

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 2006–2008.

SBA's "Size Standards Methodology" provides a detailed description of analyses of various industry and program factors and data sources and derivation of size standards using the results. In the proposed rule itself, SBA detailed how it applied "Size Standards Methodology" to review, and to modify where necessary, the existing standards for the Sector and Industries under analysis.

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 definitions of anchor size standards are 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 in its methodology.

SBA did not receive any comments on "Size Standards Methodology." SBA continues to welcome comments from interested parties.

In the proposed rule, based on its analyses of current industry and other relevant data, SBA proposed to increase 47 of the 76 size standards in NAICS Sector 44–45. SBA's analyses supported retaining the existing size standards for five industries. As noted in the proposed rule, SBA's analyses would support reducing size standards for the remaining 23 industries in the Sector. However, as the proposed rule pointed out, SBA believes that lowering size standards and thereby reducing the number of firms eligible to participate in Federal small business assistance programs would run counter to what the Agency is doing to help small businesses. Therefore, SBA proposed to retain the existing size standards for those 23 industries.

SBA also proposed to revise the language in 13 CFR 121.402(b) to be consistent with the revised Sector headings in the table of size standards by deleting the last sentence and replacing it with "Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a wholesale trade or retail trade NAICS code. A concern that submits an offer or quote for a contract or subcontract where the NAICS code assigned to the contract or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406."

#### Summary of Comments

The proposed rule sought comments from the public on SBA's proposal to increase 47 industry size standards in NAICS Sector 44–45, Retail Trade, and retain the remaining 29. SBA also requested comments on whether it should simplify size standards by reducing them to eight fixed levels. SBA

received five comments, each of which is discussed below.

One commenter strongly supported the proposed increases to size standards and requested SBA to expedite its review of another NAICS Sector in which the commenter's company was active. SBA intends to review all size standards in each NAICS Sector in a timely manner.

Another commenter suggested that there should be only one maximum revenue based and one maximum employee based size standard, regardless of NAICS industry. While this would simplify size standards even more than what SBA had proposed, the Small Business Act states that "the [SBA] Administrator shall ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the Administrator." (15 U.S.C. 632(a)(3)). The relevant data show significant differences among industries within each NAICS Sector, including Sector 44–45, and SBA believes that varying the size standard by industry not only complies with the Act, but it also serves the best interests of small businesses in that Sector. Therefore, SBA does not presently plan to reduce the number of receipts based size standard levels below eight.

A commenter stated that there exist "major economic disadvantages between a small business designated to have 500 employees and those that have 10 or less." Specifically, the commenter was concerned with the effects the various size standards have on competition for contract bidding. However, because small business size standards for industries in NAICS Sector 44–45 do not apply to Federal government contracting SBA's proposed standards would have little competitive implications for government contracting. For the Federal government's procurement of manufactured products the 500 employee nonmanufacturer rule applies in lieu of the individual standards for industries in NAICS Sector 44–45, Retail Trade. (13 CFR 121.406(b)). The commenter also suggested SBA designate a separate sub-group of truly small businesses and give them special preference for competing for smaller government contracts. While this would give truly small businesses an economic advantage over their larger counterparts, the Small Business Act authorizes the SBA Administrator to establish only one definition of small business for an industry.

An association representing new automobile dealers stated that it could not support SBA's proposed increase in the size standard for NAICS 441110, New Car Dealers, from \$29 million to \$30 million in average annual receipts and that it would be unlikely to support one even at \$35.5 million. The association also indicated that, because of the high values and sale prices of new cars, a receipts based size standard is no longer practical or appropriate for New Car Dealers. In the proposed rule, SBA had considered 100 employees as an alternative to the proposed \$30 million receipts based standard and had sought comments on whether an employee based size standard would be more appropriate for that industry. The association acknowledged that 100 employees would cover about 80 percent of single location dealerships and thus would be consistent with SBA's historical objectives. However, it was concerned that a 100 employee standard would not cover, under SBA's affiliation rule, larger dealers with two or more stores. The association, therefore, recommended 200 employees as the more appropriate size standard for New Car Dealers. The association further noted that the U.S. Department of Transportation (DOT) has adopted 200 employees as a size standard for car rental agencies at the Nation's airports under its concessionaire program. 72 FR 15614 (April 2, 2007).

Size standards for industries in NAICS Sector 44–45 primarily apply to SBA's loan and other financing programs. SBA has recently broadened and enhanced its 7(a) Business Loan Guarantee Program making its financing terms more favorable for small businesses, including New Car Dealers. As part of that effort, SBA extended, as a pilot program, its 7(a) Business Loan

Guarantee Program to Dealer Floor Plan Financing. Therefore, in this final rule, SBA is adopting 200 employees as the size standard for NAICS 441110, New Car Dealers. This will enable more car dealers to participate in SBA's financing programs than under the proposed \$30 million receipts based size standard. This is consistent with the Agency's ongoing efforts to assist more small businesses, including New Car Dealers. SBA's decision to establish a 200 employee standard for NAICS 441110, New Car Dealers, is consistent with DOT's adoption of 200 employees as a standard for its program.

An association representing marine manufacturers commented on SBA's proposed size standards for NAICS 441221, Motorcycle, ATV and Personal Watercraft Dealers (proposed increase from \$7 million to \$14 million), NAICS 441222, Boat Dealers (proposed increase from \$7 million to \$14 million) and NAICS 441210, Recreational Vehicle Dealers (proposed increase from \$7 million to \$30 million). The association expressed concern about the size standard for boat dealers as it affects their access to SBA's business and Dealer Floor Plan loans. When dealers cannot obtain financing it affects manufacturers and their ability to provide them with products. In its comment, the association stated that there are many similarities among the three industries cited above and suggested that SBA establish a common size standard for all three. Many vendors do not limit their sale to only one product. Rather, they carry and sell products that might otherwise be categorized in one of the other two NAICS codes. Adopting a common size standard for these three retail industries could be compared to SBA's having established a common size standard for

four Information Technology industries in NAICS Sector 54, Professional, Scientific and Technical Services, because of the similarities among those industries. It is customary in those industries for businesses to have capabilities to provide multiple services. SBA concurs that these three retail industries are sufficiently alike and would likely be better served with a common size standard. Therefore, in this final rule, SBA is adopting \$30 million as the common size standard for NAICS 441221, Motorcycle, ATV and Personal Watercraft Dealers, NAICS 441222, Boat Dealers, and NAICS 441210, Recreational Vehicle Dealers.

SBA did not receive any comments on whether it should lower the size standards for the 23 industries in NAICS Sector 44–45 for which SBA's analyses supported reducing the existing size standards. SBA also did not receive any comments on five industries for which SBA's analyses supported retaining the existing size standards. Therefore, SBA is retaining the existing size standards for 28 of the 76 Industries in NAICS Sector 44–45. SBA is also adopting the language as proposed to amend 13 CFR 121.402.

All comments to the proposed rule are available for public review at <http://www.regulations.gov>.

### Conclusion

Based on its analyses of relevant industry and program data and public comments it received on the proposed rule, SBA has decided to increase 46 small business size standards and to convert the receipt based size standard to the employee based size standard for one industry as shown in the following table.

### SUMMARY OF PROPOSED AND ADOPTED SIZE STANDARD REVISIONS IN NAICS SECTOR 44–45

[All dollar values in the table are in millions]

NAICS	Current size standard	Proposed size standard	Adopted size standard
441110—New Car Dealers .....	\$29.0	\$30.0	200 employees
441210—Recreational Vehicle Dealers .....	7.0	30.0	\$30.0
441221—Motorcycle, ATV, and Personal Watercraft Dealers .....	7.0	14.0	\$30.0
441222—Boat Dealers .....	7.0	14.0	\$30.0
441229—Except, Aircraft Dealers, Retail .....	10.0	25.5	\$25.5
441310—Automotive Parts and Accessories Stores .....	7.0	14.0	\$14.0
441320—Tire Dealers .....	7.0	14.0	\$14.0
442110—Furniture Stores .....	7.0	19.0	\$19.0
442299—All Other Home Furnishings Stores .....	7.0	19.0	\$19.0
443111—Household Appliance Stores .....	9.0	10.0	\$10.0
443112—Radio, Television and Other Electronics Stores .....	9.0	25.5	\$25.5
443120—Computer and Software Stores .....	9.0	25.5	\$25.5
443130—Camera and Photographic Supplies Stores .....	7.0	19.0	\$19.0
444110—Home Centers .....	7.0	35.5	\$35.5
444120—Paint and Wallpaper Stores .....	7.0	25.5	\$25.5
444190—Other Building Material Dealers .....	7.0	19.0	\$19.0
444220—Nursery and Garden Centers .....	7.0	10.0	\$10.0

SUMMARY OF PROPOSED AND ADOPTED SIZE STANDARD REVISIONS IN NAICS SECTOR 44–45—Continued

[All dollar values in the table are in millions]

NAICS	Current size standard	Proposed size standard	Adopted size standard
445110—Supermarkets and Other Grocery (except Convenience) Stores .....	27.0	30.0	\$30.0
446110—Pharmacies and Drug Stores .....	7.0	25.5	\$25.5
446120—Cosmetics, Beauty Supplies and Perfume Stores .....	7.0	25.5	\$25.5
446130—Optical Goods Stores .....	7.0	19.0	\$19.0
446191—Food (Health) Supplement Stores .....	7.0	14.0	\$14.0
447190—Other Gasoline Stations .....	9.0	14.0	\$14.0
448110—Men’s Clothing Stores .....	9.0	10.0	\$10.0
448120—Women’s Clothing Stores .....	9.0	25.5	\$25.5
448130—Children’s and Infants’ Clothing Stores .....	7.0	30.0	\$30.0
448140—Family Clothing Stores .....	9.0	35.5	\$35.5
448150—Clothing Accessories Stores .....	7.0	14.0	\$14.0
448190—Other Clothing Stores .....	7.0	19.0	\$19.0
448210—Shoe Stores .....	9.0	25.5	\$25.5
448310—Jewelry Stores .....	7.0	14.0	\$14.0
448320—Luggage and Leather Goods Stores .....	7.0	25.5	\$25.5
451110—Sporting Goods Stores .....	7.0	14.0	\$14.0
451120—Hobby, Toy and Game Stores .....	7.0	25.5	\$25.5
451130—Sewing, Needlework and Piece Goods Stores .....	7.0	25.5	\$25.5
451140—Musical Instrument and Supplies Stores .....	7.0	10.0	\$10.0
451211—Book Stores .....	7.0	25.5	\$25.5
451220—Prerecorded Tape, Compact Disc and Record Stores .....	7.0	30.0	\$30.0
452111—Department Stores (except Discount Department Stores) .....	27.0	30.0	\$30.0
452990—All Other General Merchandise Stores .....	11.0	30.0	\$30.0
453210—Office Supplies and Stationery Stores .....	7.0	30.0	\$30.0
453910—Pet and Pet Supplies Stores .....	7.0	19.0	\$19.0
453930—Manufactured (Mobile) Home Dealers .....	13.0	14.0	\$14.0
454111—Electronic Shopping .....	25.0	30.0	\$30.0
454112—Electronic Auctions .....	25.0	35.5	\$35.5
454113—Mail Order Houses .....	25.0	35.5	\$35.5
454210—Vending Machine Operators .....	7.0	10.0	\$10.0

SBA’s proposed rule indicated that its analysis might justify proposing reductions to size standards for 23 industries in this Sector. However, SBA has opted not to reduce the size standards for these industries for the reasons given in the proposed rule and above in this rule. Lowering small business size standards would be inconsistent with its ongoing effort to promote small business assistance under the Recovery Act.

**Compliance With Executive Orders 12866, 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 a “significant” regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA’s Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 800.

*Regulatory Impact Analysis*

Is there a need for the regulatory action?

SBA believes that adjustments to certain size standards in NAICS Sector

44–45, Retail Trade, are needed to better reflect the changes in economic characteristics of small businesses in those industries. SBA provides aid and assistance to small businesses through a variety of financial, procurement, business development and advocacy programs. To assist the intended beneficiaries of these programs effectively, SBA must establish distinct definitions to determine which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to the SBA’s Administrator the responsibility for establishing small business definitions. The Act also requires that small business definitions vary to reflect industry differences. The supplementary information section of the proposed rule explained in detail SBA’s methodology for analyzing a size standard for a particular industry.

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 eligibility for Federal small business assistance programs, including SBA’s financial assistance programs. Since NAICS codes in Sector 44–45, Retail Trade, may not

be used for Federal government procurement programs, the size standard changes adopted in this final rule will not provide benefits to companies when they participate in these programs, and there will not be any additional costs to the Federal government’s procurement programs resulting from these changes. Other Federal agencies also may use SBA size standards for a variety of regulatory and program purposes. Through the assistance of these programs, small businesses become more knowledgeable, stable and competitive.

In the 46 industries (including one sub-industry) in NAICS Sector 44–45 for which SBA is increasing size standards, SBA estimates that about 8,700 additional firms will obtain small business status and become eligible for Federal small business assistance programs. Similarly, in one industry, namely New Car Dealers, for which SBA is changing the size standard from \$29 million in average annual receipts to 200 employees, the Agency estimates that about 5,700 additional businesses will gain small business eligibility for these programs. In the 23 industries for which SBA’s analyses supported reducing the existing size standards, about 5,900 firms might have lost their

small business designation had SBA decided to reduce them. Thus, the net impact for the Sector as a whole is about 14,400 additional firms gaining and none losing small business status under this rule. SBA estimates that this will increase the small business share of total industry receipts for the Sector from 27 percent under the current size standards to 38 percent under the revised standards.

The benefits of increasing size standards to a more appropriate level will accrue to two groups: (1) Businesses that are above the current size standards will benefit by gaining small business status under the higher size standards, thereby being able to participate in Federal small business assistance programs; and (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 being able to continue their participation in the programs.

Nearly 72 percent of Federal contracting dollars spent in NAICS Sector 44–45 during fiscal years 2006–2008 was accounted for by six of the 47 industries for which size standards have been modified in this rule. If NAICS codes in Sector 44–45 could be used for Federal contracting, SBA estimates that additional firms gaining small business status in those six industries under the proposed size standards could obtain Federal contracts totaling up to between \$80 million and \$100 million per year. This represents nearly 2.0 percent of the \$4.7 billion in average Federal contracts awarded to the Retail Trade Sector during fiscal years 2006–2008. The added competition for many of these procurements also would likely result in a lower price to the Government for procurements reserved for small businesses, but SBA is not able to quantify this benefit. However, as stated above, NAICS codes in this Sector may not be used for Federal Government procurement. SBA anticipates that the contracting amounts identified in this Sector will be redistributed in the future to contracts identified by their correct NAICS codes in NAICS Sector 31–33, Manufacturing. (13 CFR 121.402(b)).

Under SBA's 7(a) Guaranteed Loan Program and Certified Development Company (CDC) Program, SBA estimates that approximately 75 to 100 additional loans totaling between \$35 million and \$50 million in new Federal loan guarantees could be made to these newly defined small businesses under the revised size standards. Because of the size of the loan guarantees, however, most loans are made to small businesses

well below the size standard. SBA has also applied its CDC alternative size standard to its 7(a) Business Loan Program, and as a result small businesses have greater access to capital. Thus, increasing the size standards will likely result in an increase in small business guaranteed loans to businesses in these industries, but it would be impractical to try to estimate the extent of their number and the total amount of loans.

The newly defined small businesses under the revised standards will also benefit from SBA's Economic Injury Disaster Loan (EIDL) Program. Since this program is contingent on the occurrence and severity of a disaster, no meaningful estimate of benefits can be projected for future disasters.

To the extent these 14,400 additional firms that will become small under the revised size standards would like to apply for SBA loans, there may be some additional administrative costs to the Federal Government associated with SBA's guaranteed lending programs. With an increase in the number of businesses seeking SBA assistance, there could be some additional costs associated with compliance and verification of small business status. These additional costs are likely to be minimal because necessary mechanisms are already in place to handle these additional administrative requirements.

The adopted size standards may have some distributional effects between large and small businesses, but SBA cannot quantify such effects, mainly because data on Federal procurement for NAICS Sector 44–45 are not accurate due to their being misclassified. Procurements for supplies coded in Sector 44–45, Retail Trade, should have been coded in NAICS Sector 31–33, Manufacturing.

The revisions to the existing size standards for Retail Trade industries that SBA is adopting in this rule 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 12988:* For purposes of Executive Order 12988, Civil Justice Reform, SBA has determined that this rule is drafted, to the extent practicable,

in accordance with the standards set forth in §§ 3(a) and 3(b)(2), to minimize litigation, eliminate ambiguity and reduce burden.

*Executive Order 13132:* For purposes of Executive Order 13132, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

*Paperwork Reduction Act:* For purposes of the Paperwork Reduction Act, 44 USC Chapter 35, SBA has determined that this final rule does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

### 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 Sector 44–45, Retail Trade. As described above, this rule may affect small entities seeking SBA 7(a) and 504 Guaranteed Loan Programs, SBA Economic Injury Disaster Loans, and other Federal small business programs.

Immediately below, SBA sets forth a final regulatory flexibility analysis of this final rule addressing the following questions: (1) What is the need for and objective of the rule? (2) What is 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 is the need for and objective of the rule?

Most of SBA's size standards for the Retail Trade industries have not been reviewed since the early 1980s, and many have not been changed since the 1960s, except for periodic adjustments for inflation. Technology, productivity growth, international competition, mergers and acquisitions, and updated industry definitions may have changed the structure of many industries. Such changes can be sufficient to support a revision to size standards for some industries. Based on its analysis of the latest data available to the Agency, SBA believes that the revised standards in this final rule more appropriately reflect the size of businesses in those industries that need Federal assistance.

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

In this final rule, as detailed in the regulatory impact analysis above, SBA estimates that approximately 14,400 additional firms will become small within NAICS Sector 44–45 because of increases in 46 small size standards and a change in one size standard from annual receipts to the number of employees. That represents about 3.5 percent of approximately 415,000 total firms in all industries in that Sector. This will result in an increase in the small business share of total industry receipts for that Sector from about 27 percent under the current size standards to about 38 percent under the revised size standards.

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

A new size standard does not impose any additional reporting or recordkeeping requirements on small entities. However, qualifying for Federal procurement and a number of other 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). Although NAICS codes from Sector 44–45, Retail Trade, do not apply to Federal Government procurement programs, business entities in this Sector might choose to participate in other Federal programs for which CCR registration might be required. 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 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?

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

However, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards if they believe that SBA's size standards are not appropriate for their programs, with the approval of SBA's Administrator (13 CFR 121.903). 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)). Thus, there may be instances where this rule conflicts with other rules.

(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 alternative exists to the system of numerical size standards. SBA considered a 100 employee size standard for NAICS 441110, New Car Dealers, as an alternative to its historical receipts based size standard. Although SBA proposed an increase to the receipts based standard for the industry,

it did ask for comments on whether it should adopt one based on number of employees. Based on the comments SBA received, in this final rule SBA has adopted 200 employees as the standard for this industry.

**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**

**Subpart A—Size Eligibility Provisions and Standards**

■ 1. The authority citation for 13 CFR part 121 continues to read as follows:

**Authority:** 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644, 657(a), 657(f), and 662(5); and Pub. L. 105–135, Sec. 401, et seq., 111 Stat. 2592.

■ 2. Amend 121.201 in the table by revising the entries for:

- a. Sector 42—Wholesale Trade;
- b. Sector 44–45—Retail Trade; and
- c. “441110”, “441210”, “441221”, “441222”, “441229 Except”, “441310”, “441320”, “442110”, “442299”, “443111”, “443112”, “443120”, “443130”, “444110”, “444120”, “444190”, “444220”, “445110”, “446110”, “446120”, “446130”, “446191”, “447190”, “448110”, “448120”, “448130”, “448140”, “448150”, “448190”, “448210”, “448310”, “448320”, “451110”, “451120”, “451130”, “451140”, “451211”, “451220”, “452111”, “452990”, “453210”, “453910”, “453930”, “454111”, “454112”, “454113”, and “454210”.

The revisions 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
*	*	*	*

**Sector 42—Wholesale Trade**

(These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal Government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.)

## 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
<b>Sector 44–45—Retail Trade</b>			
(These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal Government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.)			
441110	New Car Dealers		200
441210	Recreational Vehicle Dealers	\$30.0	
441221	Motorcycle, ATV, and Personal Watercraft Dealers	30.0	
441222	Boat Dealers	30.0	
441229	Aircraft Dealers, Retail	25.5	
441310	Automotive Parts and Accessories Stores	14.0	
441320	Tire Dealers	14.0	
442110	Furniture Stores	19.0	
442299	All Other Home Furnishings Stores	19.0	
443111	Household Appliance Stores	10.0	
443112	Radio, Television and Other Electronics Stores	25.5	
443120	Computer and Software Stores	25.5	
443130	Camera and Photographic Supplies Stores	19.0	
444110	Home Centers	35.5	
444120	Paint and Wallpaper Stores	25.5	
444190	Other Building Material Dealers	19.0	
444220	Nursery and Garden Centers	10.0	
445110	Supermarkets and Other Grocery (except Convenience) Stores	30.0	
446110	Pharmacies and Drug Stores	25.5	
446120	Cosmetics, Beauty Supplies and Perfume Stores	25.5	
446130	Optical Goods Stores	19.0	
446191	Food (Health) Supplement Stores	14.0	
447190	Other Gasoline Stations	14.0	
448110	Men's Clothing Stores	10.0	
448120	Women's Clothing Stores	25.5	
448130	Children's and Infants' Clothing Stores	30.0	
448140	Family Clothing Stores	35.5	
448150	Clothing Accessories Stores	14.0	
448190	Other Clothing Stores	19.0	
448210	Shoe Stores	25.5	
448310	Jewelry Stores	14.0	
448320	Luggage and Leather Goods Stores	25.5	
451110	Sporting Goods Stores	14.0	

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
451120	Hobby, Toy and Game Stores	25.5	
451130	Sewing, Needlework and Piece Goods Stores	25.5	
451140	Musical Instrument and Supplies Stores	10.0	
451211	Book Stores	25.5	
*	*	*	*
451220	Prerecorded Tape, Compact Disc and Record Stores	30.0	
*	*	*	*
452111	Department Stores (except Discount Department Stores)	30.0	
*	*	*	*
452990	All Other General Merchandise Stores	30.0	
*	*	*	*
453210	Office Supplies and Stationary Stores	30.0	
*	*	*	*
453910	Pet and Pet Supplies Stores	19.0	
*	*	*	*
453930	Manufactured (Mobile) Home Dealers	14.0	
*	*	*	*
454111	Electronic Shopping	30.0	
454112	Electronic Auctions	35.5	
454113	Mail Order Houses	35.5	
454210	Vending Machine Operators	10.0	
*	*	*	*

■ 3. In § 121.402 (b), remove the last sentence and add two new sentences to the end of the paragraph to read as follows:

**§ 121.402 What size standards are applicable to Federal Government Contracting programs?**

\* \* \* \* \*

(b) \* \* \* Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a Wholesale Trade or Retail Trade NAICS code. A concern that submits an offer or quote for a contract or subcontract where the NAICS code assigned to the contract or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.

\* \* \* \* \*

Dated: September 10, 2010.

**Marie C. Johns,**

*Deputy Administrator.*

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**SMALL BUSINESS ADMINISTRATION**

**13 CFR Part 121**

**RIN: 3245-AF71**

**Small Business Size Standards; Accommodation and Food Services Industries**

**AGENCY:** Small Business Administration (SBA).

**ACTION:** Final rule.

**SUMMARY:** The United States Small Business Administration (SBA) is increasing small business size standards for five industries in North American Industry Classification System (NAICS) Sector 72, Accommodation and Food Services—namely NAICS 721110, Hotels and Motels, from \$7.0 million to \$30 million; NAICS 721120, Casino Hotels, from \$7.0 million to \$30 million; NAICS 722211, Limited Service Restaurants, from \$7.0 million to \$10 million; NAICS 722212, Cafeterias, from \$7.0 million to \$25.5 million; and NAICS 722310, Food Service Contractors, from \$20.5 million to \$35.5 million. As part of its ongoing initiative to review all size standards, SBA has evaluated every industry in Sector 72 to determine whether the existing size standards should be retained or revised.

**DATES:** This rule is effective November 5, 2010.

**FOR FURTHER INFORMATION CONTACT:** Carl Jordan, Program Analyst, Office of Size Standards, (202) 205-6618 or [sizestandards@sba.gov](mailto: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—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) and the Certified Development Company (CDC) Programs determine small business eligibility using either the industry based size standards or net worth and net income based size standards. Currently, SBA's size standards consist of 45 different size levels, covering 1,141 NAICS industries and 17 sub-industry activities. Of these size levels, 32 are based on average annual receipts, eight