

Pension Benefit Guaranty Corporation (effective May 25, 2011).

Veterans' Employment and Training Service (effective June 26, 2020).

Wage and Hour Division (effective December 29, 2016).

Parent: Department of State

Component

Foreign Service Grievance Board.

Parent: Department of Transportation

Components

Federal Aviation Administration.

Federal Highway Administration.

Federal Motor Carrier Safety

Administration (effective January 30, 2003).

Federal Railroad Administration.

Federal Transit Administration.

Maritime Administration.

National Highway Traffic Safety

Administration.

Pipeline and Hazardous Materials Safety Administration (effective December 29, 2016).

Saint Lawrence Seaway Development Corporation.

Parent: Department of the Treasury

Components

Alcohol and Tobacco Tax and Trade Bureau (effective November 23, 2004).

Bureau of Engraving and Printing.

Bureau of the Fiscal Service (effective December 4, 2014).

Comptroller of the Currency.

Financial Crimes Enforcement Network (FinCEN) (effective January 30, 2003).

Internal Revenue Service.

United States Mint (formerly listed as Bureau of the Mint).

Footnotes—Appendix B to Part 2641

^[1] All designated components under the jurisdiction of a particular Assistant Secretary shall be considered a single component for purposes of determining the scope of 18 U.S.C. 207(c) as applied to senior employees serving on the immediate staff of that Assistant Secretary.

^[2] The Executive Office for United States Attorneys shall not be considered separate from any Office of the United States Attorney for a judicial district, but only from other designated components of the Department of Justice.

^[3] The Executive Office for United States Trustees shall not be considered separate from any Office of the United States Trustee for a region, but only from other designated components of the Department of Justice.

^[4] The Office on Violence Against Women shall not be considered separate from the Office of Justice Programs, but only from other designated components of the Department of Justice.

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BILLING CODE 6345–03–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards: Revised Size Standards Methodology

AGENCY: U.S. Small Business Administration.

ACTION: Notice of availability of white paper on revised size standards methodology.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) advises the public that it has revised its size standards methodology white paper, entitled “SBA’s Size Standards Methodology (June 2024)” (the Revised Methodology or Methodology), explaining how it establishes, reviews, or revises small business size standards. SBA will apply the Revised Methodology to the forthcoming third five-year review of size standards required by the Small Business Jobs Act of 2010. On December 11, 2023, SBA published a notification seeking comments on proposed revisions to its Methodology. This notification describes major changes to the Methodology and their impacts on size standards, followed by a discussion of the comments SBA received on the proposed revisions to the Methodology and Agency’s responses.

DATES: September 12, 2024.

ADDRESSES: The 2024 Revised Methodology is available on the SBA’s website at www.sba.gov/size.

FOR FURTHER INFORMATION CONTACT: Khem R. Sharma, Chief, Office of Size Standards, (202) 205–7189, or sizestandards@sba.gov.

SUPPLEMENTARY INFORMATION:

A. Background

To determine eligibility for Federal small business assistance programs, SBA establishes small business size definitions (commonly referred to as “size standards”) for private sector industries in the United States. Under the Small Business Act (the Act), 15 U.S.C. 632(a) (Pub. L. 85–536, 67 Stat. 232, as amended), the SBA’s Administrator (Administrator) has authority to establish size standards for Federal Government programs. SBA’s existing size standards use two primary measures of business size: average annual receipts and average number of employees. Financial assets and refining capacity are used as size measures for a few specialized industries. In addition, the SBA’s Small Business Investment Company (SBIC), 7(a), and Certified Development Company (CDC/504) Programs determine small business

eligibility using either the industry-based size standards or tangible net worth and net income based alternative size standards. Presently, there are 102 different size standards, covering 978 industries and 14 subindustries, also known as “exceptions.” Of these, 505 are based on average annual receipts, 483 on number of employees (one of which also includes barrels per calendar day total refining capacity), and four on average assets.

The Small Business Jobs Act 2010 (Pub. L. 111–240, 124 Stat. 2504, Sept. 27, 2010) requires SBA to review, every five years, all size standards and make necessary adjustments to reflect market conditions. SBA completed the first five-year review of size standards under the Jobs Act in early 2016¹ and completed the second five-year review of size standards in early 2023.² SBA will begin the next (third) five-year review of size standards in the near future.

The goal of SBA’s size standards review is to determine whether its existing size standards reflect the current industry structure and Federal market conditions and revise them if the latest available data suggests that revisions are warranted. The Act requires that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries. SBA evaluates the structure of each industry in terms of four economic characteristics or factors, namely average firm size, average assets size as a proxy of startup costs and entry barriers, the four-firm concentration ratio as a measure of industry competition, and size distribution of firms using the Gini coefficient (13 CFR 121.102(a)). Besides industry structure, SBA also examines the impact of an existing size standard as well as the potential impact of a revised size standard on small business participation in Federal contracting as an additional primary factor when establishing, reviewing, or modifying the size standards. SBA generally considers these five factors—average firm size, average assets size, four-firm concentration ratio, Gini coefficient, and small business participation in Federal

¹ See Report on the First Five-Year Comprehensive Review of Size Standards at <https://www.sba.gov/sites/sbagov/files/2023-09/Report%20on%20the%20First%205-Year%20Comprehensive%20Size%20Standards%20Review-508F.pdf>.

² See Report on the Second Five-Year Comprehensive Review of Size Standards at https://www.sba.gov/sites/sbagov/files/2023-07/SBA%27s%20Report%20on%20the%20Second%205%20Year%20Review%20of%20Size%20Standards_Final.pdf.

contracting—to be the most important factors in determining an industry’s size standard. The 2024 Revised Size Standards Methodology White Paper provides a detailed description of evaluation of these factors (including relevant data sources) and derivation of size standards based on the results.

SBA also periodically adjusts all monetary based standards for inflation. In accordance with SBA’s regulations (13CFR 121.102(c)) and rulemaking (67 FR 3041; January 23, 2002), an adjustment to size standards for inflation is made at least once every five years. In response to higher than normal rates of inflation, some past inflation adjustments have been made on more frequent intervals. For example, in response to ongoing higher than normal inflation, SBA issued an out-of-cycle inflation adjustment to monetary based size standards on November 17, 2022 (87 FR 69118). The SBA’s Methodology also explains how it adjusts monetary based size standards for inflation. SBA also updates its size standards, every five years, to adopt the Office of Management and Budget’s (OMB) quinquennial North American Industry Classification System (NAICS) revisions to its table of small business size standards. Effective October 1, 2022, SBA adopted the OMB’s 2022 NAICS revisions (86 FR 72277; December 21, 2021) for its table of small business size standards (87 FR 59240; September 29, 2022). The Methodology also explains the SBA’s procedures for adopting updated NAICS definitions for the table of size standards.

Section 3(a) of the Act provides the Administrator with authority to establish small business size standards for Federal Government programs. The Administrator has discretion to determine precisely how SBA should establish small business size standards. The Act and its legislative history highlight three important considerations for establishing size standards. First, as stated earlier, size standards should vary from industry to industry according to differences among industries. 15 U.S.C. 632(a)(3). Second, a firm that qualifies as small under the SBA’s size standard shall not be dominant in its field of operation. 15 U.S.C. 632(a)(1). Third, pursuant to 15 U.S.C. 631(a), the policies of the Agency should assist small businesses as a means of encouraging and strengthening their competitiveness in the economy. These three considerations continue to form the basis for the SBA’s methodology for establishing, reviewing, or revising small business size standards.

The 2024 Revised Methodology, available on the SBA’s website at www.sba.gov/size, describes in detail how SBA establishes, evaluates, and adjusts its small business size standards pursuant to the Act and related legislative guidelines.³ Specifically, the document provides a brief review of the legal authority and early legislative and regulatory history of small business size standards, followed by a detailed description of the size standards analysis. Below, SBA provides a brief summary of the revisions to SBA’s Methodology, which are described in greater detail in the 2024 Revised Methodology.

B. Revisions to SBA’s Size Standards Methodology

SBA’s 2024 Revised Methodology describes various changes and revisions to the 2019 Methodology and provides a detailed history of changes to SBA’s Methodology for evaluating size standards over the years. In the past, including the first five-year review of size standards under the Jobs Act, to determine an overall size standard for each industry, SBA compared the characteristics of each industry with the average characteristics of a group of industries associated with an “anchor” size standard. For example, in the first five-year review of size standards, \$7 million (now \$9 million due to the inflation adjustments in 2014, 2019, and 2022) was considered the “anchor” for receipts-based size standards and 500 employees was considered the “anchor” for employee-based size standards. If the characteristics of a specific industry under review were similar to the average characteristics of industries in the anchor group, SBA generally adopted the anchor size standard for that industry. If the specific industry’s characteristics were significantly higher or lower than those for the anchor group, SBA assigned a size standard that was higher or lower than the anchor.

In response to public comments received during the first five-year review of size standards concerning SBA’s size standards methodology, section 3(a)(7) of the Act (which limits the SBA’s ability to create common size standards by grouping related industries below the four-digit NAICS level), and its own review of the Methodology, in

the 2019 Methodology, SBA replaced the “anchor” approach with the “percentile” approach, as the basis of evaluating industry factors (*i.e.*, average firm size, average assets, the four-firm concentration ratio, and the Gini coefficient) and deriving a size standard for each industry factor for each industry.⁴ Under the “percentile” approach, for each factor, an industry is ranked and compared with the 20th percentile and 80th percentile values of that factor among the industries sharing the same measure of size standards (*i.e.*, receipts or employees). Combining that result with the 20th percentile and 80th percentile values of size standards among the industries with the same measure of size standards, SBA computes a size standard supported by each industry factor for each industry, then computes a weighted average of the resulting supported size standards to obtain an overall size standard for each industry.

In the 2024 Revised Methodology, SBA is maintaining the “percentile” approach as a basis of evaluating industry factors and deriving size standards for each industry factor for each industry; however, based on its review of the current methodology, SBA is adopting two major changes to its size standards methodology.

The first major change is to replace the current approach used to account for the Federal contracting factor with the disparity ratio approach. Under the 2019 Methodology, SBA defined the Federal contracting factor for each industry averaging \$20 million or more in Federal contracts annually as the difference between the small business share of total contract obligations and the small business share of industry’ receipts. If the small business share of an industry total receipts exceeds the small business share of total contract obligations by ten percentage points or more, all else being the same, SBA would increase that industry’s current size standard by a certain amount depending on the amount of that difference. If that difference is less than ten percentage points, SBA considers that the current size standard is sufficient with respect to the Federal contracting factor.

Under the disparity ratio approach, SBA computes a disparity ratio as a

³ Prior to finalizing the 2024 Methodology for establishing, reviewing, modifying size standards, SBA issued a notification in the December 11, 2023, issue of the *Federal Register* (88 FR 85852) to solicit comments from the public and notify stakeholders of the proposed changes to the Methodology. As discussed under the “Discussion of Comments” section of this notification, SBA considered all public comments in finalizing the 2024 Methodology.

⁴ For a detailed justification for replacement of the “anchor” approach to size standards analysis with the “percentile” approach and a detailed description of the percentile approach, see the SBA’s 2019 Size Standards Methodology White Paper, available on SBA’s website at <https://www.sba.gov/sites/default/files/2023-12/SBA%20Size%20Standards%20Methodology%20April%202011%2C%202019-508.pdf>.

ratio (instead of the difference) between the small business share of contract obligations (utilization ratio) and the small business share of industry receipts (availability ratio). SBA also computes a second disparity ratio as a ratio between small business share of the number of contracts (utilization ratio) and the share of small firms in the total population of firms that are willing, ready, and able to bid on and perform Federal contracts (availability ratio).

If an industry's disparity ratio is less than 0.8, SBA would assume that small businesses are either materially underrepresented (*i.e.*, the disparity ratio is 0.5 or greater and less than 0.8) or substantially underrepresented (*i.e.*, the disparity ratio is less than 0.5) in the Federal market under that industry's current size standard and would generally propose to increase the current size standard. If an industry's disparity ratio is 0.8 or higher, small businesses are considered overrepresented (*i.e.*, the disparity ratio is 0.8 or higher and less than 1.2) or substantially overrepresented (*i.e.*, the disparity ratio is 1.2 or higher) in the Federal market in that industry under the current size standard, and the size standard is maintained at the current level.

The second proposed major change is to replace the 20th percentile and 80th percentile values of industry factors for evaluating size standards at subindustry levels ("exceptions") currently calculated based on the Economic Census data with those calculated using the Federal Procurement Data System—Next Generation (FPDS–NG) and the System for Award Management (SAM) data.

SBA is adopting these changes in order to refine and improve its analysis of Federal contracting data used in the evaluation of industry size standards. These changes are also in response to public comments received during the second five-year review of size standards that pertained to Federal contracting trends generally. Although SBA did not specifically seek comments to the 2019 Methodology as part of the series of proposed rules issued to review size standards under the second five year review,⁵ SBA notes that a number

of commenters to SBA's proposed rules expressed positions both for and against SBA's proposed size standards based on Federal contracting trends, data, or analysis.⁶ Thus, given the demonstrated relevance of Federal contracting trends to small businesses, SBA believes that it is important to continually review and adjust its methodology for evaluating Federal contracting data to ensure its analysis accurately captures the varying impact of Federal contracting trends by industry.

To determine how the above changes in the Methodology would affect size standards across various industries and sectors, SBA derived the new size standards for all industries averaging \$20 million or more in Federal contract dollars annually (excluding Sectors 42 and 44–45) using the 2019 Methodology and the disparity ratio approach of defining the Federal contracting factor under the 2024 Methodology. Overall, the calculated size standards were quite similar between the two approaches when compared to the existing size standards, with size standards increasing for some industries and decreasing for others under both approaches.

SBA believes that using FPDS–NG and SAM data to obtain the 20th percentile and 80th percentile values of industry factors for evaluating size standards for the exceptions, instead of using the percentiles from the Economic Census, will promote consistency in its analysis of the exceptions by ensuring that the percentile values and factor values for each exception are in comparable terms. Specifically, SBA has found that for most industries, the average firm size of businesses participating in Federal contracting is generally larger than the average firm size of businesses represented in the Economic Census. There are also inconsistencies in data reporting

Business Size Standards: Education Services; Health Care and Social Assistance; Arts, Entertainment and Recreation; Accommodation and Food Services; Other Services (85 FR 76390; November 27, 2020), and Small Business Size Standards: Wholesale Trade and Retail Trade (86 FR 28012; May 25, 2021), Small Business Size Standards: Manufacturing and Industries With Employee-Based Size Standards in Other Sectors Except Wholesale Trade and Retail Trade (87 FR 24752; April 26, 2022). Comments available at www.regulations.gov.

⁶ Prior to finalizing the 2019 Methodology for revising size standards under the second five-year review, SBA issued a notification in the April 27, 2018, issue of the **Federal Register** (83 FR 18468) to solicit comments from the public and notify stakeholders of the proposed changes to the 2019 Methodology. SBA considered all public comments in finalizing the 2019 Methodology. For a summary of comments and SBA's responses, refer to the SBA's April 11, 2019, **Federal Register** notification (84 FR 14587).

between SAM/FPDS–NG data and the Economic Census, which SBA will address by adopting the revised approach. Thus, SBA believes that using FPDS–NG and SAM to obtain the percentile values of industry factors for the exceptions will better reflect the varying economic characteristics of the underlying industries. The full results of SBA's impact analysis as well as a detailed description of the major changes to SBA's evaluation of size standards are included in the 2024 Revised Methodology.

In the 2024 Revised Methodology, SBA is also updating the minimum and maximum size standard levels based on current minimum and maximum size standard levels. The minimum size standard generally reflects the size a small business should be to have adequate capabilities and resources to be able to compete for and perform Federal contracts. On the other hand, the maximum size standard represents the level above which businesses, if qualified as small, would cause significant competitive disadvantage to smaller small businesses when accessing Federal assistance. SBA will not generally propose or adopt a size standard that is either below the minimum or above the maximum level, even though the calculations might yield values below the minimum or above the maximum level.

With respect to receipts-based size standards, SBA is adopting \$8 million and \$47 million, respectively, as the minimum and maximum size standard levels (except for most agricultural industries in Subsectors 111 and 112). These levels reflect the current minimum and the current maximum of receipts-based size standards. As in the 2019 Methodology, the latest industry data from the 2017 Census of Agriculture suggests that \$8 million minimum and \$47 million maximum size standard levels would be too high for agricultural industries in Subsector 111 and Subsector 112. Accordingly, SBA is adopting \$2.25 million and \$5.5 million, respectively, as the minimum and maximum size standard levels for agricultural industries in Subsectors 111 and 112 (excluding NAICS 112112 and NAICS 112310). These levels represent the current minimum and current maximum levels of size standards in Subsectors 111 and 112 (excluding NAICS 112112 and NAICS 112310).⁷

⁷ NAICS 112112 (Cattle Feedlots) and NAICS 112310 (Chicken Egg Production) currently have a size standard of \$22 million and \$19 million, respectively, and will be subjected to the \$8 million minimum and \$47 million maximum size standards

Continued

⁵ See Small Business Size Standards: Agriculture, Forestry, Fishing and Hunting; Mining, Quarrying, and Oil and Gas Extraction; Utilities; Construction (85 FR 62239; October 2, 2020), Small Business Size Standards: Transportation and Warehousing; Information; Finance and Insurance; Real Estate and Rental and Leasing (85 FR 62372; October 2, 2020), Small Business Size Standards: Professional, Scientific and Technical Services; Management of Companies and Enterprises; Administrative and Support and Waste Management and Remediation Services (85 FR 72584; November 13, 2020), Small

Regarding employee-based size standards for manufacturing and other industries that have employee-based size standards (excluding Wholesale and Retail Trade), SBA's 250-employee minimum and 1,500-employee maximum are the current minimum and maximum employee based size standards among those industries. For employee-based size standards for Wholesale Trade and Retail Trade industries, the minimum and maximum size standards levels are 50 employees and 250 employees, respectively.⁸

SBA is also updating the percentile values, derived from the latest 2017 Economic Census and other industry data, used to evaluate the structure of each industry in terms of the four economic characteristics or factors, namely average firm size, average assets size, the four-firm concentration ratio, and the Gini coefficient. As explained in the 2024 Revised Methodology, SBA ranks industries by size standard types in terms of the four industry factors and in terms of the existing size standards, then computes the 20th percentile and 80th percentile values for both. SBA then evaluates each industry by comparing its value for each industry factor to the 20th percentile and 80th percentile values for the corresponding factor for industries under a particular type of size standard. The updated 20th percentile and 80th percentile values for the four factors for receipts-based and employee-based size standards are found in Table 5 and Table 6 of the 2024 Revised Methodology, respectively; the updated 20th percentile and 80th percentile values of size standards are found in Table 7.

C. Discussion of Comments

On December 11, 2023, SBA published a notification in the **Federal Register** seeking comments on the above changes to its size standards methodology and a number of policy issues or questions it faces regarding the size standards methodology (88 FR 85852). Pursuant to section 1344 of the Jobs Act, on June 23 and 25, 2023, SBA also held two public forums on size standards to update the public on the status of the quinquennial reviews of size standards under the Jobs Act and seek public feedback on proposed

proposed for other industries with receipts-based size standards.

⁸ Current employee-based size standards for the wholesale and retail trade industries range from 100 employees to 250 employees. However, as in the 2019 Methodology, SBA is proposing a lower 50-employee level as the minimum employee-based size standard to account for differences among industries more accurately.

revisions to the size standards methodology.

SBA received a total of 21 comments (including one received during the public forums on size standards), of which 19 were significant. Of these 19 comments, two represented SBA's administrative records of two public forums designed to update the public on the status of quinquennial reviews of size standards under the Jobs Act and seek feedback on SBA's Revised Methodology, which will be used to review and adjust size standards under the forthcoming third five-year review of size standards. Public comments are summarized below and are available on the Federal Government e-rulemaking portal at www.regulations.gov.

1. General Support/Comment

SBA received four comments that expressed full support for its Revised Methodology. One commenter found the Revised Methodology to be a reasonable and consistent approach to establish, review, and modify size standards. The commenter appreciated the SBA efforts to incorporate the recent amendments to the Small Business Act and to address the public comments to the 2019 Methodology. Specifically, the commenter commended the SBA for making certain analytical improvements, such as adopting a percentile approach, assigning a separate size standard for each NAICS industry, lowering the threshold for the Federal contracting factor, and applying the 4-firm concentration ratio to all industries. The commenter believed that these changes would better reflect the current market conditions and ensure that the size standards are in accordance with the legislative guidelines. Overall, the commenter supported the Revised Methodology, and urged SBA to finalize and publish it as soon as possible. The commenter stated that the Revised Methodology will provide a fair and consistent definition of a small business and will enable SBA to fulfill its mission of assisting and promoting the small business community.

Another commenter, a service-disabled veteran-owned small business (SDVOSB), extended its full support for the SBA's proposed revisions to the Methodology. The commenter believed that proposed revisions are a significant step toward creating a more equitable, competitive, and dynamic small business landscape. SBA received two comments that also supported SBA's proposed revisions to the Methodology but did not provide any reasons for their support.

A women-owned small business advocacy group submitted a comment to

the SBA Revised Methodology. The commenter neither opposed nor supported the proposed revisions to the Methodology. Similarly, an industry association circulated the Revised Methodology to its 400-plus members and solicited their feedback. The members' input neither supported nor opposed the overall Methodology but agreed with the SBA position on a number of policy issues and questions regarding the Methodology.

SBA Response

In absence of significant adverse comments against the Revised Methodology generally, SBA is adopting it as published for comments even though a couple of comments, as discussed below, objected using the FPDS-NG and SAM data to compute the 20th percentile and 80th percentile values of industry factors to evaluate the size standards at the subindustry levels, usually known as "exceptions." One comment, also discussed below, opposed using the maximum size standards caps in calculating new size standards for each industry factor as well as in calculating the overall size standard for the industry. SBA did not receive any comment that objected to the adoption of the disparity ratio approach to account for small business participation in the Federal market.

2. Comments on Specific Issues/ Questions Pertaining to the Methodology

SBA sought feedback on a number of specific policy issues and questions it faces regarding the Methodology for establishing, reviewing, and modifying size standards. A number of commenters specifically addressed these issues, as discussed below.

Should SBA establish size standards that are higher than industry's entry-level business size?

Three commenters addressed this issue. A commenter concurred with the SBA's position that size standards must be established above the entry-level size to ensure small businesses have the necessary resources and capabilities to be able to perform and meet Federal Government contracting requirements. Another commenter supported the SBA's approach to establishing size standards that reflect the current realities of industry-specific dynamics, including setting standards above entry-level business sizes. This approach ensures that businesses with a footprint slightly above the "entry level" can still access vital resources and opportunities, fostering growth and innovation within their respective fields, the commenter added. SBA received another comment

from an industry association saying that SBA should continue using the size standards that are higher than the industry's entry-level business size. The commenter agreed with the SBA's position that establishing size standards at the industry entry-level firm size would cause small businesses to outgrow their eligibility very quickly, thereby lacking sufficient experience to succeed outside the small business market. More importantly, such size standards would likely lead to the undesirable outcome of fewer companies competing for Federal contracts, the commenter noted.

SBA Response

In the absence of adverse comments against establishing the size standard above the entry-level business size, SBA adopts its approach of setting size standards higher than the entry-level business size to enable small businesses to compete against others of their size and considerably larger businesses for Federal contracts set-aside for small businesses. It is important that small businesses can apply for and be eligible for the various SBA's contracting and business development programs that have additional requirements, such as a minimum number of years in business to qualify for its 8(a) Business Development Program. This precludes setting size standards at too low a level or at the entry-level size. Additionally, establishing size standards at the industry entry-level firm size would cause small businesses to outgrow their eligibility very quickly, thereby lacking sufficient cushion or experience to succeed outside of the small business market. Finally, size standards must be above the entry-level size to ensure that small businesses have necessary resources and capabilities to be able to bid on and perform Federal contracts.

Should there be a ceiling beyond which a business concern cannot be considered as small? In other words, should there be a maximum size standard?

SBA received three comments addressing this issue, with two supporting and one opposing the SBA's position. One commenter supported the introduction of a maximum size standard because it is beneficial for maintaining the integrity of small business programs. The commenter asserted that establishing a maximum size standard cap ensures that Federal small business programs remain accessible to businesses that genuinely need them while preventing larger entities from overshadowing the competitive landscape for true small businesses, including SDVOSBs. A

maximum size standard would serve as a safeguard, ensuring that the small business benefit is preserved for those it is intended to support, the commenter added.

SBA received a comment from an industry association supporting the SBA's policy to continue maintaining the minimum and maximum levels for both receipts- and employee-based size standards. The commenter agreed with the SBA's position that, without the maximum caps as defined by the Revised Methodology, the calculated size standards would be extremely large for some industries, allowing very successful businesses with hundreds of millions in receipts or tens of thousands of employees to qualify as small for Federal assistance intended for small businesses.

SBA received a comment disagreeing with SBA's proposed maximum caps of \$47 million for revenue-based size standards and 1,500 employees for employee-based size standards. The commenter explained that size standards would better reflect the economic characteristics of industries if there were no caps on size standards and instead SBA permitted its industry-specific analysis of the data to determine the appropriate size standard for the industry. If SBA feels caps are necessary, the commenter urged SBA to provide a sound economic analysis to justify the application of caps. The caps result in lower size standards than would otherwise be calculated, and the Methodology no longer aspires to find a true economically appropriate size standard, the commenter argued. The commenter asserted that arbitrary caps are inconsistent with the requirement that size standards vary from industry to industry according to differences among industries and SBA's policies of encouraging and strengthening competition in the economy. Because of the introduction of caps, SBA runs the risk of being perceived to favor the smallest small businesses at the expense of the larger small businesses, the commenter noted. The commenter urged SBA to let the data drive the results instead of policies.

SBA Response

SBA agrees with the industry association that, without the maximum caps, the calculated size standards would be extremely high, allowing, in some cases, extremely large companies with billions of dollars in revenues and tens of thousands of employees to qualify as small business. Capping calculated size standards at certain minimum and maximum levels is crucial for fulfilling the SBA's mission

to serve and protect the interests of American small businesses and ensuring that Federal small business assistance goes to small businesses most in need of such assistance. For this reason, in the Revised Methodology, SBA retains its policy of capping the calculated receipts-based size standards at \$47 million and calculated employee-based size standards at 1,500 employees. SBA has maintained its employee-based maximum size standard cap at the 1,500 employees despite the increased automation and resultant labor productivity growth. However, the receipts-based size standards have gradually increased over time due to inflationary adjustments, and the highest receipts-based size standard stands at \$47 million today.

Should SBA consider adjusting employee-based size standards for labor productivity growth or increased automation?

Four comments addressed this issue. SBA received a comment justifying the lack of SBA's adjustment to employee-based size standards for labor productivity growth and technical changes because it is difficult to measure and compare the productivity and technology levels across industries and over time.

Another comment argued that, without seeing a specific proposal, it is difficult to comment on whether SBA should consider adjusting employee-based size standards for labor productivity growth or increased automation. However, the commenter recommended proceeding cautiously, as small businesses might not have the necessary capital to take advantage of automation and robotics.

Another commenter argued that the rapid pace of technological advancement and its impact on labor productivity and automation necessitates adjustments to employee-based size standards and suggested that SBA incorporate considerations for labor productivity growth and automation into its Methodology. This adjustment would ensure that size standards remain relevant and that businesses utilizing technology to enhance productivity or automate processes are not unfairly classified as small due to efficiency gains, the commenter added.

SBA received a comment supporting the SBA's current approach of not adjusting employee-based size standards for labor productivity growth. By updating size standards every five years, those factors are already captured in SBA's analysis of the industry structure, the commenter added. The commenter argued that any separate adjustments

would simply double count the impact of the productivity changes that are already reflected in the industry data.

SBA Response

Of the four comments addressing this issue, three supported the SBA's current approach of not adjusting employee-based size standards for increased automation and labor productivity growth, even though the Agency adjusts monetary-based size standards for inflation. Just as firms in industries with monetary-based size standards may lose small business eligibility due to inflation, firms in industries with employee-based standards may gain eligibility due to improvement in labor productivity and technical change. There are three reasons for SBA for not adjusting employee-based size standards for productivity growth and technical change. First, there does not exist robust labor productivity growth data by 6-digit NAICS industry. Second, SBA agrees with one of the commenters supporting no labor productivity adjustment of employee-based size standards that the impact of changes in labor productivity are already reflected in the quinquennial Economic Census data that SBA uses to evaluate industry structure. Third, just as an adjustment to monetary-based size standards for inflation leads to increases in size standards, thereby allowing businesses to gain or maintain their small business status, an adjustment to employee-based size standards for labor productivity growth would lead to decreases in size standards, thereby causing currently small businesses to lose their small business status and eligibility for Federal small business assistance, which may run counter to the SBA's policy of not lowering size standards under distressed economic environment. For these reasons, in the Revised Methodology, SBA maintains its policy of not adjusting employee-based size standards for labor productivity growth.

Should SBA consider lowering its size standards generally?

Four comments addressed this issue. One commenter opposed lowering size standards arguing that many businesses have made investments based upon their ability to access small business set-aside markets and lowering size standards would unfairly penalize them.

Citing the ongoing decline in the number of small businesses participating in the Federal marketplace, one commenter opposed lowering size standards. The commenter argued that lowering size standards will not only exacerbate this situation but also harms small businesses and

deprives agencies of increased competition and the experienced small business vendor base. Instead of lowering size standards, the commenter added, SBA should look into raising size standards, thereby allowing more small businesses to remain in the Federal market longer. The commenter asserted that raising size standards would both expand the small business industrial base for Federal agencies and extend the runway for these firms as they grow and have a chance to successfully graduate from their status as small businesses. The commenter maintained that, by lowering size standards, SBA will decrease the pool of eligible offerors under the Rule of Two, and thus lowering size standards would lead to fewer small business set-asides overall due to the reduced applicability of the Rule of Two.

An industry association recommended that SBA should not lower size standards. The association did not believe that lowering size standards would support the Administration's and SBA's goals to reverse a downward trajectory of fewer small businesses receiving Federal prime contracts. The association maintained that lowering size standards generally may further squeeze successful small businesses, limit returns on the Government's investments in small business growth and deprive agencies of increased competition. To support its argument, the commenter cited the Government Accountability Office (GAO) finding that only 22% of graduating businesses remain mid-size and only three percent of graduating businesses break through mid-size status to large. The commenter maintained that contracting trends also do not support lowering size standards as individual set-aside contracts have increased in value such that small businesses may be catapulted beyond their size standards, often in a single contract or task order. These small businesses face a tough situation: unable to remain qualified as "small," they must survive in "full and open" competitions with larger companies.

A commenter representing the elevator industry believed that with increased inflation and raw materials costs, especially in construction-related industries with significant material outlays, broad-based lowering of size standards would be short-sighted and should not be enacted.

SBA Response

All four comments addressing this issue opposed lowering size standards, generally. SBA receives periodic comments from the public that its size

standards are too high in certain industries or for certain types of Federal contracting opportunities. The comments generally concern the competitive edge that large small businesses have over the "truly small businesses" (a phrase heard frequently from commentators). On the other hand, SBA also receives comments from larger small businesses that their size standards are too small to qualify for Federal contracting opportunities and other Federal small business assistance. This has always been a challenging issue, one that SBA has had to deal with over the years. SBA's size standards appear too large to the smallest of small businesses while larger small businesses often request even higher size standards. SBA examines four industry factors (average firm size, average assets size as a proxy of startup costs and entry barriers, 4-firm concentration ratio, and Gini coefficient) and small business participation in Federal contracting to determine if the existing industry size standards need to be adjusted. SBA considers analytical results, impacts of new size standards on small businesses, public feedback on proposed size standards, and the prevailing market conditions to decide on whether the size standard should be raised, lowered, or retained at the current level. SBA may lower calculated size standards if they are found to have enabled a dominant firm to qualify as small.

Should SBA lower size standards regardless of prevailing economic conditions when the analytical results support lowering them, or should it consider the prevailing economic environment when deciding on whether to revise size standards?

Three comments addressed this issue. One commenter supported the SBA's policy of not lowering size standards during periods of fluctuating economic conditions. The commenter argued that businesses do better when there is certainty in the rules, thereby allowing them to plan for the future.

An industry association recommended that if SBA were to consider lowering size standards, such action should not be tied to the prevailing economic conditions. Rather, any such reduction should be based on an assessment of fluctuations in contracting that cannot be attributed to a single factor or economic period. It noted that the prevailing economic conditions are only one factor to consider and only represent a snapshot in time, instead of market understanding over time.

SBA received a comment applauding SBA's effort to review size standards on a five-year basis and to raise standards

to counter the effects of inflation, thereby expanding opportunities for more small businesses to support Federal clients. Despite these efforts, however, the GAO and others have cited a decline in the number of small businesses supporting the Federal marketplace, the commenter noted. They also noted a significant drop in businesses out of the Federal market once they cross the “valley of death” into “other than small” business status, where businesses struggle to secure contract opportunities. Lowering size standards will only further exacerbate this situation, depriving agencies of both increased competition and skilled and experienced workforce. Instead, SBA should look into raising size standards to allow more small businesses to remain in the Federal marketplace longer, the commenter noted. The commenter stated that this would both expand the small business base for Federal agencies and improve the runway for these firms as they grow and ultimately graduate.

SBA Response

Prior SBA policy has been to consider the prevailing economic environment when deciding on whether to revise size standards. In response to the distressed economic environment in the aftermath of the 2007–2009 Great Recession, in the first five-year review of size standards under the Jobs Act, SBA adopted a policy of not lowering size standards even though the data supported lowering them for some industries. Similarly, in response to the COVID–19 pandemic and its impacts on small businesses and the overall economy, during the second five-year review of size standards under the Jobs Act, SBA adopted a similar policy of not lowering any size standards even though the analytical results supported lowering them. SBA will continue to consider the prevailing economic conditions and their impacts on small businesses in revising size standards as a secondary factor in its analysis.

Should SBA adopt the disparity ratio approach to evaluating small business participation in the Federal market, which will replace the Federal contracting factor the Agency used in the past? Should SBA adopt the results from the power analyses of the disparity ratios?

Four comments addressed this issue, all supporting the SBA’s new disparity approach to account for Federal contracting trends. One commenter supported the new disparity ratio approach to evaluating small business participation in the Federal market, arguing that this new approach would

better capture the entire spectrum of small business participation in Federal contracting. Another commenter also expressed strong support for the SBA’s proposed adoption of the disparity ratio approach to account for small business participation in the Federal market. The commenter added that the proposed approach promises a more equitable and accurate reflection of small business participation in the Federal market, thereby making size standards that are more aligned with actual market participation and potential and enhancing ability of small businesses to secure Federal contracts. Another commenter also supported SBA’s new disparity ratio approach to measure small businesses’ share of Federal contracting in relation to the broader industry.

An industry association recommended that SBA use the disparity ratio approach where it might lead to increased participation from under-represented industries. The association members believed the disparity ratio approach might, in some industries where small businesses are not well represented as prime contractors, help draw more contractors into the Federal space by increasing size standards. The industry association’s view is that power analyses should not be used because they do not consider the actual performance of small businesses.

SBA Response

Absent significant adverse comments, SBA is adopting the disparity ratio approach to measure the Federal contracting factor as proposed. In the previous Methodology, SBA only considered the small business share of Federal contract dollars relative to the small business share of total industry receipts. Under the disparity ratio approach, SBA is also considering the number of Federal contracts awarded to small businesses relative to their proportion in the population of firms that are ready, willing, and able to bid on and perform Federal contracts. Thus, the disparity ratio provides a more accurate representation of small business participation in the Federal market. Since only a very few industries were impacted by the power analyses, SBA has decided to not use the results from the power analyses, consistent with the industry association’s recommendation.

Should SBA continue using the Economic Census data to obtain the 20th percentile and 80th percentile values of industry factors for evaluating size standards for exceptions, or should it start using FPDS–NG and SAM data?

Three comments addressed this issue, with one supporting the SBA’s proposal and two opposing it. One commenter supported the use of FPDS–NG and SAM data for industry analysis for exception size standards. It makes sense that SBA should use the same consistent source of data throughout the analysis where possible, the commenter added.

Another commenter disagreed with the SBA’s proposal to use FPDS–NG and SAM data to obtain the 20th percentile and 80th percentile values of industry factors for evaluating size standards for the NAICS exceptions. The commenter contended that the use of FPDS–NG and SAM data would limit the SBA’s analysis to the subset of companies engaged in Federal contracting only. Many small businesses rely on these size standards for purposes other than Federal contracting, the commenter added. The commenter recommended continuing to use the Economic Census data to obtain the 20th percentile and 80th percentile values of industry factors for evaluating size standard exceptions.

Based on the input from its members, an industry association also recommended that SBA continue using Economic Census data because it captures firms not currently working in the Federal space and is therefore consistent with the intent of the Methodology. The association explained that if SBA were to rely on FPDS–NG and SAM data, the results would incorporate only a subset of firms working in a given industry that hold Federal contracts. Using Economic Census data paints a more accurate picture of firms operating in the various industries, in and out of Government, the commenter added.

SBA Response

The data from the Census Bureau’s Economic Census tabulation are limited to the six-digit NAICS industry level and therefore do not provide information on economic characteristics of firms at the subindustry level. Thus, SBA uses the FPDS–NG and SAM data to derive the industry factors for exceptions. To be consistent, SBA is proposing to adopt the FPDS–NG and SAM data to obtain the 20th percentile and 80th percentile values of industry factors for evaluating size standards for the NAICS exceptions, instead of using the percentiles from the Economic Census. SBA believes that using the FPDS–NG and SAM data to obtain the 20th percentile and 80th percentile values of industry factors for evaluating size standards for the exceptions, instead of using the percentiles from the Economic Census, will promote

consistency in its analysis of the exceptions by ensuring that the percentile values and factor values for each exception are in comparable terms. Specifically, SBA has found that for most industries, the average firm size of businesses participating in Federal contracting is generally much larger than the average firm size of businesses represented in the Economic Census. There are also inconsistencies in reporting between the SAM/FPDS-NG data and the Economic Census, which SBA will address by adopting the revised approach. Thus, SBA believes that using the FPDS-NG and SAM data to obtain the percentile values of industry factors for the exceptions will better reflect the varying economic characteristics of the underlying industries. The full results of SBA's impact analysis as well as a detailed description of the major changes to SBA's evaluation of size standards are included in the 2024 Revised Methodology.

Should size standards vary from program to program?

SBA received two comments addressing this issue, with both expressing support for the SBA's position of not varying the size standards from program to program. One commenter opposed size standards to vary from program to program because many small businesses participate in more than one SBA's program. The commenter argued that changing size standards from program to program would create substantial confusion.

An industry association recommended that, absent a clear benefit, size standards should not vary from program to program. The association believed that size standards need to be clearly understood by the acquisition community so that set-aside decisions and subcontracting goals can be realistically established. Adding additional sets of standards by program in addition to varying them from industry to industry would add multiple layers of complexity for small firms that may not have the resources to develop additional staff expertise in tracking the applicability of size standards for each program, especially for those involved in multiple programs, the commenter added.

SBA Response

Consistent with the above comments, for all industries except for Wholesale Trade and Retail Trade industries, where businesses for SBA's financial and other Federal non-procurement programs qualify under the industry-specific size standards and those for

Federal procurement qualify under the 500-employee nonmanufacturer size standard, SBA retains its policy of maintaining the uniform size standard for both procurement and non-procurement programs. SBA had, in the 1980s, established different size standards for different programs. The result had been that some firms were small for some programs and large for others. Such size standards were very confusing to users and caused unnecessary and unwanted complexity in their application. The statutory guidance encourages an industry-by-industry analysis and not a program-by-program analysis when developing small business size definitions. While the characteristics and needs of a particular SBA's program may necessitate the deviation from the uniform size standards, the Agency will continue its general policy of favoring one set of size standards for all programs. For example, SBA has established 14 special size standards for specific activities (commonly referred to as "exceptions") within certain industries for Federal procurement purposes. Additionally, for the SBA's SBIC, 7(a), and CDC/504 Programs, businesses can qualify either based on industry specific size standards for their primary industries or based on a tangible net worth and net income based alternative size standard.

Should size standards apply nationally or should they vary geographically?

Five comments addressed this issue, all opposing size standards varying geographically. One commenter asserted that size standards should apply nationally, not geographically, but did not provide reasons for its position. Another commenter also opposed geographically differing size standards. The commenter argued that the notion of geographically differing size standards is not reflective of the reality of the modern-day global economy, in which vendors and suppliers operate remotely and across multiple states and national boundaries. The commenter urged SBA to maintain uniform industry size standards across geographic regions.

An industry association recommended that size standards should apply nationally, rather than geographically. The association agreed with the SBA's position that application of Economic Census data to determine size standards geographically would be at a minimum cumbersome and time consuming, resulting in a complex set of size standards that would likely be unusable. The association maintained that adding in a geographic variable

would complicate the application of size standards for the reasons provided. For example, if applied at place of delivery or at multiple locations of delivery, how would the size standards differentiate between sizes of companies performing on that task order or between subcontractors and contractors? Application of size standards geographically would create more confusion than opportunity, the commenter added.

A commenter representing the elevator industry believed that trying to segment size standards geographically would lead to a host of unintended consequences that would render the size standards impossible to effectively implement. The commenter asked how the size standards would be applied when a contractor is headquartered in one geographic region (such as a state) and performs contracts in others. Another commenter agreed with the SBA's position that varying size standards geographically would lead to undue complexity and the resulting confusion would render geographically based size standards unusable.

SBA Response

The statute defines a small business concern as the one which is independently owned and operated and which is not dominant in its field of operation (15 U.S.C. 632 (a)(1)). The statute does not exclude from the definition those small businesses that might dominate their fields of operations within a specific geographic area. Whether a firm is "not dominant in its field of operation" is made at the national level.

The statute requires SBA to ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries (15 U.S.C. 632(a)(3)). However, the statute does not require SBA to vary the size standard from geography to geography to account for geographical differences in industrial characteristics.

If SBA were to establish size standards that would vary geographically, SBA would need to identify a proper unit of geography. Should it be the region, state, county, or other basis? Whatever basis SBA were to choose, SBA likely would need to vary each of the 1,000-plus industry-based size standards by geography. This could result in tens or even hundreds of thousands of size standards using geography-industry pairs. The public would then face the immense burden of reviewing, commenting on, and complying with those size standards.

Another challenge with geographically varying size standards would be determining the applicable size standard when the vendor's location is different from the location of contract performance. Which size standard would be applicable in determining the small business status of the vendor? Should it be the size standard that applies to the area where the vendor is located, or should it be the size standard applicable to the location of contract performance? If vendor location, firms with multiple locations would either be subject to multiple size standards or a complex series of regulations to determine which location sets the size standard. If location of contract performance, firms would compete on an uneven basis because they would be subject to different size standards.

Geographically varying size standards may inappropriately influence entrepreneurs' decisions on selecting business location. If size standards varied geographically, entrepreneurs would tend to be encouraged to move from places with lower size standards to places with higher size standards to receive the benefits of higher size standards. This may lead to potential disparities in entrepreneurship and business development among geographic regions. This might inadvertently suppress economic development in already-distressed regions as firms seek optimal locations based on regulatory compliance rather than economic forces.

SBA determines the size standards based on special tabulations of business data from the Economic Census, which is compiled and reported nationally. The same level of details of Economic Census data is not available for smaller geographical units. SBA is required to set size standards that would exclude firms that are "dominant in their field of operation," and that criteria is set nationally. As a result, in large part, the size standards are higher than they would be if the Agency were to look at smaller geographic areas because very few firms that are dominant locally are dominant nationally. Data limitations preclude an extensive analysis of businesses within specific industries on a geographical basis.

For the above reasons and commenter's views discussed above, SBA will continue to establish and apply the size standards at the national level, without considerations to geographical differences in industry characteristics.

Are there alternative approaches that SBA should consider for determining small business size standards?

Two comments addressed this issue. One commenter suggested that SBA should reconsider establishing a common size standard for closely-related NAICS codes, such as those under NAICS 5415, Computer Systems Design and Related Services. The commenter argued that, until the most recent revision, all 6-digit industries under NAICS 5415 had the same size standard because those NAICS codes are used interchangeably by agencies, resulting in confusion.

An elevator company suggested that SBA should consider irrefutable, publicly available data provided by industry participants and industry expertise in the context of determining the size standard for the elevator industry. With respect to the elevator industry, the commenter argued that elevator maintenance, repair and modernization companies are vastly different from elevator inspection companies, and it would be inappropriate to lump them into one category simply because they both relate to the elevator industry. The commenter argued that companies involved in maintenance, repair and modernization of elevators are dramatically different from those companies involved in inspection of elevators. Compared to the latter, the commenter noted, the former have significant barriers to entry and very high concentration of large companies that dominate the market. Elevator inspection companies, on the other hand, have very low barriers to entry, do not require licensed mechanics, and have dramatically lower revenue per employee, and higher competition within the industry, the commenter added. The commenter contended that equipment needed to perform elevator inspection contracts is less costly than that required to perform maintenance contracts.

SBA Response

The National Defense Authorization Act of Fiscal Year 2013 (NDAA 2013) (Pub. L. 112–239, section 1661, Jan. 2, 2013) amended the Small Business Act to prohibit SBA from limiting the number of size standards and to require SBA to assign specific size standards for each NAICS industry. This limits the SBA's ability to group NAICS industries to establish a common size standard. Additionally, according to section 3(a)(7) of the Small Business Act, SBA may establish or approve a single size standard for a grouping of 4-digit NAICS codes only the Agency makes publicly available, not later than the date on which such size standard is established or approved, a justification demonstrating that such size standard is

appropriate for each individual industry classification included in the grouping. However, the results from the second 5-year review of the size standards under the Jobs Act (85 FR 72484; November 13, 2020) did not support the same size standard for all industries in NAICS 5415. For example, calculated size standards for those industries varied from \$20.5 million for NAICS 541511, Custom Computer Programming Services, to \$32.5 million for NAICS 541513, Computer Facilities Management Services.

With respect to the comment regarding the size standard for the elevator industry, SBA encourages the commenter to submit this information as comment to the proposed rule reviewing the monetary-based size standards the Agency will issue as part of the forthcoming third 5-year review of size standards under the Jobs Act. As indicated elsewhere in this document, any concerns regarding the size standard(s) for a specific industry or group of industries are beyond the scope of the Methodology.

How have SBA's latest size standards revisions impacted competition in general and within a specific industry?

One company operating in the elevator industry noted that the elevator maintenance-related industry, usually classified under NAICS 238290, Other Building Equipment Contractors, has a revenue-based size standard of \$22 million, whereas elevator manufacturing industry, NAICS 333921, Elevator and Moving Stairway Manufacturing, has a size standard of 1,000 employees. The commenter argued that the \$22 million revenue size standard is a significant barrier to growth of elevator maintenance companies. The SBA current size standards have unintentional consequences for the elevator industry in terms of limiting competition, the commenter noted. The commenter argued that the current size standards for elevator related work have allowed multi-national, multi-billion elevator companies to dominate the Federal market. Elevator maintenance contracts are performed by highly trained and compensated personnel using expensive and sophisticated equipment, which leads to higher contract prices, causing elevator maintenance companies to perform fewer contracts before they exceed the revenue-based size standard, the commenter added. Thus, the commenter recommended that SBA should consider using an employee-based size standard of 1,000 employees for the elevator maintenance industry as revenue is not the best indicator of business size.

SBA Response

With respect to the comment regarding the size standard for the elevator industry, SBA encourages the commenter to submit this information as comment to the proposed rule reviewing the monetary-based size standards the Agency will issue as part of the forthcoming third 5-year review of size standards. As indicated elsewhere in this document, any concerns regarding the size standard(s) for a specific industry or group of industries are beyond the scope of the Methodology. Moreover, for industries with significant subcontracting, such as construction-related industries, SBA uses receipts, not employees, as a measure of business size for size standards purposes.

Are there alternative or additional factors or data sources that SBA should consider when establishing, reviewing, or revising size standards?

One commenter supported the omission from the Revised Methodology of the effects of industry dynamics, such as entry and exit of firms, mergers and acquisitions, and changes in market structure, on the size standards because it is impractical and unnecessary to account for these factors in the Methodology. The commenter maintained that SBA reviews and adjusts the size standards periodically, at least once every five years, to reflect the changes in the industry characteristics and market conditions. Therefore, the size standards are not static or fixed, but dynamic and flexible, and they can accommodate the variations and fluctuations in the industry dynamics over time, the commenter noted.

Another commenter maintained that one factor that SBA should consider when establishing, reviewing, or revising its size standards is the impact of a reduction in size standards on the viability of small businesses. The commenter proposed making a reduced size standard become effective 180 days after publication of the final rule in the **Federal Register**.

A comment from the elevator industry believed SBA should consider non-biased, irrefutable, and publicly available information provided to it by industry participants to supplement SBA determination of the size standard within a given industry. The commenter maintained that, while the Economic Census data provides a directionally accurate snapshot of certain industries, it is not a 100% accurate representation of the underlying facts related to companies' sizes within that industry. Additionally, certain industries are not

clearly represented within the NAICS manual at all, namely, the elevator industry, the commenter noted. The commenter recommended that SBA should create a new NAICS code for the elevator industry and establish a size standard of 1,000 employees, the same size standard that applies to the elevator manufacturing industry.

SBA Response

The commenter's statement that the Methodology omits the factors such as entry and exit of firms and mergers and acquisitions is not quite correct. As a proxy of startup costs and entry barriers, SBA evaluates the average assets size as one of the four industry factors when establishing, reviewing, and modifying size standards. Similarly, mergers and acquisitions may lead to affiliation, thereby affecting the calculation of business size for size standards purposes. As part of the regulatory impact analysis of the proposed and final rules, SBA is required to include a statement describing the impact of size standards changes (including decreases) on small businesses in terms of access to small business assistance. Similarly, as part of its decision on whether to revise a size standard, SBA examines, as a secondary factor, impacts of size standards changes on small business access to and eligibility for Federal assistance. In most cases, SBA allows the final rules to become effective 30 days from their publication in the **Federal Register**. Thus, assuming that the size standards revisions include both increases and decreases, it would be impractical to make a higher size standard effective 30 days from the date of publication of the final rule in the **Federal Register** and delay the effective date for a lower size standard to 180 days. Delaying the effective date for higher size standards to 180 days would prevent some larger small businesses from realizing the benefits of size standards increases. SBA always encourages industry participants to provide, as part of their comment to the proposed rules, the alternative industry data or facts pertaining to a specific industry's size standard. SBA will consider such data or facts very thoroughly and may even adjust the proposed size standard as a result.

Does SBA's current approach to establishing or modifying small business size standards make sense in the current economic environment?

Four comments addressed this issue. One commenter agreed that the SBA's current approach to establishing or modifying small business size standards makes sense in the current economic environment and supported the SBA's

policy of not lowering size standards during periods of fluctuating economic conditions.

Another commenter, a woman-owned small business (WOSB), operating under NAICS 236220, Commercial and Industrial Building Construction, expressed appreciation for revisions to size standards in response to the fluctuations in economic conditions due to the COVID-19 pandemic and believed that the Revised Methodology will provide further refinements to the considerations of industry factors and Federal market conditions.

An industry association asserted that the current approach is the most practical approach at this time. Establishing a different approach to small business size standards would be a complex challenge that should be undertaken with clear objectives and with sufficient time to conduct analyses and assess the potential results of alternative approaches, the commenter added.

A comment from the elevator company felt that the SBA's current approach does a very good job of accounting for inflation and other macroeconomic environment affecting small businesses. The periodic size standard increases to account for inflation have been handled expeditiously and been beneficial to all small businesses, the commenter added. However, the commenter felt the SBA should consider irrefutable publicly available information from industry participants relating to any given industry. SBA should consider such information to better support its effort to establish a correct size standard for an industry in question.

SBA Response

SBA agrees with the commenters that the Revised Methodology makes sense in the current economic environment. SBA will continue to consider the prevailing economic environment when deciding on whether the size standards should be revised or retained at the current levels. SBA is committed to complete the quinquennial reviews of size standards under the Jobs Act in a timely manner to ensure that size standards reflect current market conditions. Similarly, SBA is also committed to periodically assess the impacts of inflation on monetary-based size standards and make necessary adjustments.

3. Other Issues

Provide detailed data and calculated size standards.

SBA received three comments demanding that SBA provide the

underlying data involved in the calculations for the Methodology and calculated size standards under the Revised Methodology. One commenter asked SBA to provide a detailed table showing size standards under the current Methodology and those under the Revised Methodology to be better able to provide comments to proposed changes to the Methodology.

Another commenter asked if it is possible for SBA to provide access to the data used in the calculations in the white paper. Without this data it is impossible to make an assessment if the Methodology determines fair and reasonable size standards, the commenter argued. The problem with the Methodology is that it appears to use data that is not available to the public, the commenter added. Without access to this data, it is difficult to compare the results of the Methodology, and perhaps have the ability to look for and point out problems or areas for improvement in the Methodology.

Another commenter requested that SBA provide a detailed analysis of how proposed changes, especially the adoption of the disparity ratio approach and the utilization of the FPDS-NG and SAM data, will affect small businesses across various industries, especially an assessment of potential impacts on small business participation in Federal contracting.

SBA Response

SBA has provided a summary of calculated industry size standards under the 2019 Methodology and the 2024 Revised Methodology in Table 15 under the Impacts of Changes Methodology Section of the Revised Methodology. Of 392 industries averaging \$20 million or more in Federal contracting annually during fiscal years 2020–2022, based on the latest data available to SBA when the Revised Methodology was prepared, 159 or 40.5% of industries would see an increase to size standards under the 2019 Methodology, as compared to 169 or 43.1% of industries that would see an increase to size standards under the 2024 Revised Methodology. Similarly, 169 or 43.1% of industries under the 2019 Methodology and 167 or 42.6% of industries under the 2024 Revised Methodology would see a decrease to size standards. Sixty-four or 16.3% of industries under the 2019 Methodology and 56 or 14.3% of industries under the 2024 Revised Methodology would see no change to size standards. Thus, comparing the results from the 2019 Methodology and the 2024 Methodology, slightly more industries would see an increase to size standards under the 2024 Methodology and

slightly more industries would see no change to size standards under the 2019 Methodology. Thus, overall, the changes to size standards as the result of the changes in the Methodology would have a very minimal impact on number of businesses that qualify as small. Excluding Sectors 42 and 44–45, 97.77% of businesses would qualify as small under the calculated size standards under both Methodologies. That figure is 97.78% under the current size standards.

Inconsistency between general size standards and exceptions.

One commenter, referring to the size standards for the general NAICS 237990, Other Heavy and Civil Engineering Construction, and the Dredging subindustry (or “exception”) under that industry, stated that there exists inconsistency between size standards for general NAICS industries and size standards at the subindustry levels or “exceptions,” especially when the size standard for a general NAICS industry is lower than the size standard for a subindustry or exception within that industry. The commenter contended that this could create confusion or unfairness for businesses that operate in both the NAICS industry and the subindustry or exception, or that compete with businesses that do, by allowing them to qualify as small under the exception but not small under the general NAICS industry. It may also affect the accuracy and consistency of the data and statistics that SBA and other agencies collect and report on the small business sector, the commenter argued. The commenter suggested that SBA provide a clear rationale and a consistent rule for handling the cases of inconsistency between the size standards for general NAICS industries and their corresponding subindustry or exception size standards.

SBA Response

The Small Business Act requires that size standards vary from industry to industry to reflect differing characteristics among the various industries. Thus, it is not uncommon for a firm operating in multiple industries to be small in some industries and other than small in others. That also applies to size standards for the general NAICS industry size standards and the size standards at the subindustry levels or exceptions. Except for the Dredging exception that has a lower size standard than that for the general NAICS 237990, usually size standards at the subindustry levels (“exceptions”) are larger than those for the general industries. Thus, it is not unusual for companies operating both under general

NAICS industry and subindustry levels to be small under the exception size standards and other than small under the general NAICS size standards. It is logical for a firm to be other than small under the Dredging exception and to be small under the general NAICS 237990 because the characteristics of firms of that specific sublevel may be different from the characteristics of the firms that constitute the general level, of which there may be a much greater number. The subindustry categories are used solely for Federal procurement purposes and are not used by the Government to collect industry statistics.

Analytical Equations

One commenter stated that while the equations that SBA uses to calculate size standards, such as simple average, weighted average, linear transformation, and linear interpolation are simple and easy to implement, they may not capture the complexity and diversity of the industries and the market conditions.

1. *Weighted average:* The commenter argued that by assigning higher weights to larger firms, a weighted average may provide a more accurate and representative measure of the industry characteristics than a simple average, which treats all data equally, but it may also introduce some problems, such as data availability and reliability, and it may make the calculation and communication of the size standards more complex and less transparent. Without providing any facts and analysis, the commenter argued that the weighted averaged may not be consistent with the legislative intent and the SBA’s statutory mandate to consider the industry characteristics of all businesses in an industry.

SBA Response

SBA does not face any problem of data availability and reliability in calculating the weighted average firm size. The Economic Census special tabulation that SBA receives from the U.S. Census Bureau to examine industry structure contains the results for weighted average, along with other measures (such as simple average firm size, 4-firm concentration ratio, Gini coefficient, etc.), calculated based on actual firm-specific data. SBA used the weighted average firm size as one of the factors to evaluate industry structure in both the first and second five-year reviews of size standards under the Jobs Act but did not receive any adverse comments or complaints from the public or industry participants citing its complexity or lack of transparency. Therefore, SBA will continue using the

weighted average firm size as one of the factors to evaluate industry structure.

2. *Linear transformation:* The commenter suggested replacing a linear transformation of industry characteristics with a logarithmic transformation to reduce the skewness and outliers in the data and to improve the normality and homoscedasticity of the distribution. However, a logarithmic transformation may also complicate the calculation and communication of the size standards, and it may not be simpler and more transparent than a linear transformation, the commenter argued. Furthermore, the commenter added that a logarithmic transformation may affect the clarity and transparency of the size standards, as it may make the size standards less intuitive and more difficult to understand and verify by businesses and Federal agencies that use them. Therefore, the commenter recommended weighing the benefits and drawbacks of using a logarithmic transformation and compare it with the current method of using a linear transformation, which is simpler, transparent, consistent, and stable.

SBA Response

As maintained elsewhere, the special tabulation of the quinquennial Economic Census that SBA receives from the U.S. Census Bureau contains various measures of industry characteristics (e.g., simple average firm size, weighted average firm size, four-firm ratio, and Gini coefficient, etc.) that SBA evaluates in analyzing size standards. The Census Bureau calculates these measures from the original, raw firm-specific data without any transformation of such data. SBA does no transformation of the results provided by the Census Bureau. Thus, the potential problems with linear transformation that the commenter identified are nonissues. Moreover, as noted by the commenter, the logarithmic transformation has several drawbacks, including that it is complex, less transparent, difficult to understand, and unstable.

3. *Linear interpolation:* The commenter suggested using a nonlinear interpolation, such as a spline or a polynomial, instead of a linear interpolation to capture the potentially nonlinear relationships between industry characteristics and size standards. The commenter argued that an industry with a high degree of competition or innovation may have a more complex or dynamic relationship between the industry characteristics and the size standards, which may not be adequately captured by a linear interpolation. However, the commenter

noted that using a spline or a polynomial interpolation may introduce more uncertainty and variability in the results, and it may not be more stable and consistent than a linear interpolation. Additionally, a spline or a polynomial interpolation may impair the simplicity and clarity of the size standards, as it may make the calculation and communication of the size standards more sophisticated and less straightforward, the commenter noted.

SBA Response

The commenter recommended using a spline or nonlinear interpolation, instead of linear interpolation, to capture the potentially nonlinear relationships between industry factors and size standards. However, it contended that using a spline or a polynomial interpolation may introduce more uncertainty, complexity, inconsistency, variability, and instability in the results. We have found a linear interpolation to produce reasonable results that are more intuitive, more straightforward, and easier to explain to the stakeholders. Moreover, generally there is a positive correlation between industry factors and size standards.

Use of gross domestic product (GDP) price index.

One commenter supported the use of the GDP price index as the measure of inflation because it captures the overall changes in the prices of goods and services produced in the economy, which affect the costs and revenues of businesses in all industries. The commenter added that alternative measures of inflation, such as the Consumer Price Index (CPI) or the Producer Price Index (PPI), may not be suitable because they focus on specific segments of the economy, such as consumers or producers, and may not reflect the diversity and complexity of the business activities and transactions.

SBA Response

As part of the 2014 inflation adjustment (79 FR 33647; June 12, 2014), SBA reviewed various measures of inflation published by the Federal Government, including the GDP price index, the CPI, the PPI, the personal consumption expenditures (PCE) price index, and the unit labor cost for their appropriateness to use for adjusting monetary-based size standard for inflation. Based on that review, SBA determined that, being the most comprehensive measure of price movements for the overall economy, the GDP price index is the most appropriate measure of inflation for purposes of

adjusting size standards for inflation. Historically, SBA has used the GDP price index for adjusting size standards for inflation.

Inclusion of the 4-firm ratio.

One commenter stated that the application of the 4-firm concentration ratio to all industries is reasonable because it is a simple and widely used indicator of market structure and competition. It measures the share of the total industry revenue that is earned by the four largest firms in the industry, and it ranges from 0 to 100, where higher values indicate higher concentration and lower values indicate lower concentration. The 4-firm concentration ratio is also consistent with the SBA's statutory mandate to consider the degree of competition among businesses in an industry when setting the size standards.

SBA Response

Using the 4-firm concentration ratio SBA compares the degree of concentration within an industry to the degree of concentration of the other industries with the same measure of size standards. The 4-firm concentration ratio is widely used as a measure of industry concentration. Prior to the 2019 Methodology, SBA used the 4-firm concentration ratio only for the industries where its value was 40% or higher. Starting from the 2019 Methodology, SBA started using the 4-firm concentration ratio for all industries regardless of its magnitude. If a significantly higher share of economic activity within an industry is concentrated among the four largest firms compared to most other industries, all else being equal, SBA would set a size standard that is relatively higher than for most other industries. Conversely, if the market share of the four largest firms in an industry is appreciably lower than the similar share for most other industries, the industry will be assigned a size standard that is lower than those for most other industries.

Decreases to size standards.

Citing the information provided on page 56 of the Revised Methodology that under the disparity ratio approach, 167 or 42.6% of industries averaging \$20 million or more in Federal contracting would see a decrease on size standards, one commenter asked SBA to clarify whether it intends to decrease size standards for some industries based on proposed changes in the Methodology.

SBA Response

The question of whether SBA would increase, decrease, or retain the size standards is beyond the scope of the

Methodology. The Methodology merely provides the framework for reviewing and calculating new size standards, but it does not drive SBA's determination on whether to revise or retain size standards. That determination will be made through rulemakings with the considerations of the results from the latest available industry and Federal procurement data, comments to the proposed changes in size standards, impacts of proposed size standards changes on small business access to Federal small business assistance, the prevailing economic conditions and their impacts on small businesses, and Administration's and SBA's policies and programs.

Impact of the revised methodology.

One commenter asked if SBA has calculated the impacts of its proposed changes in the Revised Methodology on the size standards for each of NAICS 6-digit level industries? If so, what is the projected impact on NAICS 541330, Exception 1, Military and Aerospace Equipment and Military Weapons, the commenter asked.

SBA Response

As discussed elsewhere in this document, SBA provided in Table 13 of the Revised Methodology a summary of impacts of proposed revisions to the Methodology on the size standards for 6-digit NAICS industries averaging \$20 million or more in Federal contracting. SBA did not provide that information for the specific NAICS industries or subindustries because that would change when SBA updates the industry and Federal procurement data. The information on the changes in the size standard for a specific NAICS industry or subindustry would be provided in the proposed rules that Agency will publish in the near future as part of the third 5-year review of size standards under the Jobs Act.

Calculation of receipts under subcontracting.

One commenter noted that to perform complex Government contracts successfully, small business prime contractors must frequently subcontract significant portions of work to large businesses or other small businesses. The commenter argued that under the employee-based size standards, the number of subcontractor employees working on a contract is not counted as part of the small business prime contractor's employee total. However, under receipts-based size standards, the subcontractor's share of contract receipts is included in the small business prime contractor's total annual receipts despite the facts that these receipts, other than administrative costs,

are not part of the prime contractor's annual revenue, the commenter added. Has the SBA considered making the two standards consistent with each other by excluding subcontractor annual receipts from a small business prime contractor's annual receipts total, the commenter asked.

SBA Response

According to 13 CFR 121.104, receipts for size standards purposes means all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Regarding the comment that SBA should modify its definition of receipts to allow for the exclusion of amounts paid to third-party subcontractors (usually referred to as "pass-throughs"), SBA disagrees. SBA does not allow for the exclusion of "pass-throughs" because they are part of the usual and customary costs of doing business. Accordingly, SBA considers "pass-throughs," and other similar factors, as secondary factors when it establishes small business size standards. Specifically, the Economic Census data that SBA uses in its size standards analysis includes all revenues received by companies, including the values of their subcontracts. If the "pass-throughs" were allowed to be excluded from the calculation of receipts, SBA would also have to revise its methodology to establish a lower size standard to reflect the size of the industry without them. Thus, SBA does not believe it is reasonable to exclude these costs from the calculation of receipts.

Calculation of receipts for joint ventures.

A commenter stated that to successfully bid on and perform complex Government contracts small businesses must occasionally enter into joint venture agreements with other small businesses in the same industry. The current regulations and proposed modifications do not adequately address how the division of contract receipts among joint ventures should be used to calculate an individual company's annual receipts for purposes of small business size standards calculations, the commenter argued. The commenter noted that the current regulations also do not adequately address how receipts allocated to subcontractors should be apportioned in calculating the annual receipts of the small business joint ventures. Has the SBA considered amending its size standards methodology and regulations to address

allocation of annual receipts, the commenter asked.

SBA Response

For size standards calculations, a concern must include in its receipts its proportionate share of joint venture receipts. Proportionate receipts do not include proceeds from transactions between the concern and its joint ventures (e.g., subcontracts from a joint venture entity to joint venture partners) already accounted for in the concern's tax return. In determining the number of employees, a concern must include in its total number of employees its proportionate share of individuals employed by the joint venture. For the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture. For a populated joint venture (where work is performed by the joint venture entity itself and not by the individual joint venture partners) the appropriate share is the same percentage as the joint venture partner's percentage ownership share in the joint venture. For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee counts. See 13 CFR 121.103(h)(3).

4. General and Industry Specific Size Standards

General size standards.

Without providing any facts or analysis, a comment from an advocacy organization for WOSBs argued that SBA's current industry size standards do not incentivize small business growth. The commenter maintained that under the current size standards, small businesses face risk of losing their small business status if their revenue exceeds a certain threshold due to a single high revenue generating contract. The commenter cited a testimony from a WOSB to the February 6, 2023, House Small Business Committee Hearing on size standards, arguing that her business has been teetering on the edge of its small business size standard, which puts her in a difficult position as she plans the future of her business. She testified to the Committee that if she lost her small business size status, she would have to lay off at least 30% of her staff of 95 people, the commenter added. The commenter contended that businesses that lose their small business status may lose opportunities to win

contracts, given that midsized businesses are set up to compete against much larger companies with more resources. Small business owners do not have many options if they are at risk of losing their status, the commenter noted. The commenter stated that they are forced to reduce or cap their revenue, sell off part of their business, or team up with another small firm to keep their status. In case of teaming up with another firm, small businesses only retain 49% of contracts they earned, the commenter argued.

SBA Response

While SBA recognizes challenges the larger small businesses close to exceeding size standards and mid-size firms that have already exceeded the size standards face in competing in the Federal market, deliberations of such issues are beyond the scope of the Revised Methodology. SBA notes that there will always be some businesses in the brink of exceeding the size standards regardless how high the size standards are. To address the concerns that midsized businesses face in the Federal market, SBA recently implemented the Congressional enactments to increase the averaging period for calculating annual receipts from 3 years to 5 years (Pub. L. 116–283) and averaging period for calculating the number of employees from 12 months to 24 months (Pub. L. 115–324). As advised elsewhere in this document, the commenters are advised to submit any concerns regarding the size standards for specific size standards when SBA issues for comment the proposed rule covering their industries.

Industry-specific size standards. *NAICS 236220, Commercial and Institutional Building Construction.*

Citing the lingering economic impacts from the COVID–19 pandemic and high post-pandemic inflation, a commenter proposed increasing the size standard for NAICS 236220, from the current \$45 million in average receipts to \$50 million. The commenter did not provide any industry analysis and facts supporting its proposal.

SBA Response

The latest industry and Federal contracting data that SBA used to prepare the proposed rule to review the size standards for industries in the construction sector (NAICS 23) under the Jobs Act supported a size standard of \$25.5 million size standard for NAICS 236220 (85 FR 62239; October 2, 2020). Because of the SBA's policy of not lowering any size standard in light of the impacts of the COVID–19 pandemic on small businesses and the overall

economy, in the final rule (87 FR 18607; March 31, 2022), SBA adopted the existing \$39.5 million existing size standard, which was later increased to \$45 million as part of inflationary adjustment in 2022 (87 FR 69118; November 17, 2022). As advised elsewhere in this document, the commenters are advised to submit any concerns regarding the size standards for specific industries when SBA issues for comment the proposed rule covering their industries.

NAICS 541330, Engineering Services.

Citing reasons such as the use of the qualifications-based selection process under the Brooks Act, which is said to be dominated by the largest firms, the high degree of concentration of the Federal market share among the top 10 largest companies, and the Federal Government's increasing reliance on limited competition contract vehicles (such as IDIQs and GWACs) to procure engineering services, the commenter recommended increasing the size standards for NAICS 541330 to \$39.5 million in average annual revenue. The commenter attached its comment it submitted to the proposed rule published as part of the second 5-year review of size standards under the Jobs Act and its March 27, 2021, letter to the SBA's Administrator urging the Agency to establish a \$39.5 million size standard for NAICS 541330.

SBA Response

As part of the second 5-year review of size standards under the Jobs Act, based on the latest available industry and Federal procurement data, SBA had proposed increasing the size standard for NAICS 541330 from \$16.5 million to \$22.5 million as part of the second 5-year review of size standards (85 FR 72584; November 13, 2020). Based on the considerations of public comments and industry data, SBA adopted \$22.5 million in the final rule (87 FR 18665; March 31, 2022), which SBA increased to \$25.5 million as part of adjustment of monetary based size standards for inflation in 2022 (87 FR 69118; November 17, 2022). The concerns regarding the size standards for specific industries are beyond the scope of the Revised Methodology. The Methodology merely provides an analytical framework for reviewing existing and calculating new size standards. SBA's actual decisions to change or modify size standards are implemented through rulemakings. SBA encourages the commenters to submit their concerns regarding the size standards for specific industries, including any relevant data and analysis, by commenting on the

forthcoming proposed rules reviewing size standards for those industries.

NAICS 336611, Ship Building and Repairing.

SBA received a comment from a small business concern operating under NAICS 336611 that currently has a size standard for 1,300 employees. The commenter stated that the ship building and repairing market is dominated by very large companies with tens of thousands of employees that receive funds from the Federal Government, enabling them to improve their facilities and equipment and to make ship building more efficient. Large businesses leverage these same efficiencies when competing against small businesses, creating an unfair competitive advantage, the commenter contended. The commenter asserted that with the size standard of 1,300 employees, the industry is currently very competitive. Large businesses constantly lobby the Federal Government to increase their market share at the expense of the market share of small businesses that lack resources and constituent base for lobbying, the commenter added. A business with 1,300 employees would have revenue in the range of \$300 million, which is certainly not a small business in the ship repair industry, the commenter argued. The commenter, based on above factors, urged that SBA should not increase the size standard for NAICS 336611 beyond 1,300 employees, as doing so would enable large businesses to compete against small businesses as small businesses.

SBA Response

The latest industry and Federal procurement data that was available for SBA to review the size standard for Manufacturing industries as part of the second 5-year review of size standards under the Jobs Act supported a size standard of 1,300 employees for NAICS 336611, an increase from 1,250 employees (87 FR 24752; April 26, 2022). Accordingly, in the final rule, SBA adopted 1,300 employees as the size standard for NAICS 336611 (88 FR 9970; February 15, 2023). As stated elsewhere, the concerns regarding the size standards for specific industries are beyond the scope of the Revised Methodology. The Methodology merely provides an analytical framework for reviewing existing and calculating new size standards. SBA's actual decisions to change or modify size standards are implemented through rulemakings. SBA encourages the commenters to submit their concerns regarding the size standards for specific industries, including any relevant data and

analysis, by commenting on the forthcoming proposed rules reviewing size standards for their industries.

Environmental remediation services (ERS) exception to NAICS 562910, Remediation Services.

A commenter stated that the ERS exception, first established in 1994 (59 FR 47236; September 15, 1994), is fundamentally different from most other exceptions. The commenter contended that all exceptions—except the ERS exception and the exceptions to Research and Development (R&D) NAICS codes—are derived from subsets of the primary NAICS industry from which the subindustry or exception originates. While the size standards for exceptions to R&D NAICS codes are derived by aligning the corresponding manufacturing size standards, the ERS exception, unlike all other exceptions, is not derived from the subset of the primary NAICS 562910, the commenter added. The commenter argued that such uniqueness of the ERS exception comes from the original formulation of the ERS industry, as reflected in Footnote 14 of the SBA's table of size standards which recognizes that no single industry dominates the scope of the ERS work. The commenter contended that the ERS exception is a superindustry instead of a subindustry. Some firms competing in ERS may designate the base NAICS 562910 as their primary industry, but others may not, the commenter noted.

The commenter expressed concerns about the SBA's approach to creating the ERS industry by trimming the largest ERS awardees whose primary activity is unrelated to ERS. The commenter expressed the opinion that excluding such firms is arbitrary and nonsensical within the meaning of Footnote 14. The commenter proposed to identify a primary industry for each ERS awardee and to exclude those which do not align with industries that SBA used to formulate the ERS industry originally. If this proposed solution is not acceptable to SBA and if SBA still decides to remove large companies from the dataset in future rulemakings, the commenter recommended that SBA provide a list of the specific firms removed from the dataset. This approach would provide greater transparency and would allow industry participants to comment on whether the removed companies were or were not significant players in the ERS market, the commenter argued. The commenter further argued that removing large companies, unknown to the public, from SBA's dataset, without providing opportunity for industry feedback on the propriety of specific exclusions, introduces opacity and arbitrariness that

ultimately undermines the credibility of SBA's Methodology. The industry cannot provide meaningful comment as to whether an excluded firm is an ERS competitor if the SBA is not transparent and does not identify the excluded firms, the commenter argued.

The commenter argued that large competitors in the ERS industry have a serious advantage over smaller businesses in terms of winning and executing work, even where only a small portion of their total revenue comes from ERS work. Large firms enjoy economies of scale that would give them a tremendous competitive advantage over a small business making roughly similar revenue. The commenter explained that many ERS awards are qualifications based, meaning that the company must demonstrate it has a superior performance history and workforce when considering the qualifications sought in the request for proposal. A large company with a more diverse performance history can leverage the relevant qualifications to win work.

The commenter maintained that to the extent competitions are instead based on price criteria, a large business performing a comparatively small amount of ERS work also has a disproportionate advantage over smaller companies. The commenter argued that a large company with a comparatively small ERS portfolio can spread the same ERS workload across a much larger workforce, using a more favorable labor mix, achieving greater labor utilization, and driving down indirect costs. These advantages have a direct impact on pricing, the commenter noted. Moreover, the large business can take advantage of greater corporate resources to hire, train, and deploy labor, further disadvantaging small businesses who must consider the total headcount impact of hiring to perform management and overhead tasks, the commenter added.

Excluding the largest businesses from the sample will have a deleterious effect on the viability of small businesses in the ERS industry, the commenter stated. The commenter noted that SBA's size standards provide small businesses a protected marketplace in which to grow and prepare for future open competition. However, setting size standards at an artificially low threshold prematurely thrusts successful ERS small businesses into the same marketplace occupied by their largest competitors. This will cause graduating ERS small businesses to suffer unequal and inferior protection when compared to other graduating small businesses. This outcome would appear to be

inconsistent with the statutory goal of the SBA to grow small businesses into the American marketplace.

SBA Response

SBA does not agree with the commenter that SBA has kept the size standard for the ERS exception artificially low. Between 2016 and 2023, the ERS size standard has doubled to 1,000 employees. Despite the majority of comments opposing any increase to the ERS size standard, in 2016, SBA increased it from 500 employees to 750 employees, as part of the first 5-year review of size standards under the Jobs Act (81 FR 4436; January 26, 2016). Again, despite the majority of comments opposing any increase to the ERS size standard, in 2023, SBA increased the ERS size standard from 750 employees to 1,000 employees, as part of the second 5-year review of size standards (88 FR 9970; February 15, 2023).

Without trimming the largest companies for which the ERS contract awards account for a minimal share of their total revenues, SBA is concerned that the data might result in a very high size standard that might hurt smaller ERS companies that need Federal assistance the most. Just as graduating mid-sized companies have a hard time competing on unrestricted Federal contracts with large companies with vast resources and an extensive performance history, smaller small ERS firms also face a competitive disadvantage in competing with larger, more experienced small businesses for set-aside Federal contracts.

As stated elsewhere, the industry data in the quinquennial Economic Census tabulations that SBA receives from the Census Bureau are limited to the 6-digit NAICS industry. Thus, the industry data in the special tabulation does not allow for the evaluation of the size standards at the subindustry levels or exceptions. Accordingly, SBA utilizes the FPDS-NG and SAM data to calculate industry factors at the subindustry levels. The results from the FPDS-NG/SAM data are then compared with industry benchmarks (such as 20th percentile and 80th percentile values of industry factors) from the Economic Census tabulation to compute the new size standards for the exceptions. In the Economic Census tabulation, the industry data are tallied by a primary NAICS industry. Thus, to make the FPDS-NG/SAM results consistent with the results from the Economic Census, SBA trims the firms, from both ends of the distribution, for which a specific exception under review is not their primary industry. Going forward, in the Revised Methodology, SBA will base the

20th percentile and 80th percentile values of industry factors for the exceptions also on the FPDS-NG and SAM data, thereby largely reducing the need of trimming firms for which a particular exception in question is not their primary industry. If the trimming is still warranted, SBA will try to be transparent regarding the firms being trimmed while protecting their privacy.

Recognizing that, by definition, the ERS exception includes activities from multiple industries, a new footnote (Footnote 54) has been added to the Revised Methodology, stating that to evaluate the ERS size standard SBA will identify identify firms receiving contracts in the various NAICS industries under the PSCs that correspond to the ERS exception.

Elevator size standard.

A commenter argued that there is no NAICS code that specifically applies to the elevator industry. In absence of a separate NAICS code for the elevator industry, the commenter provided a list of NAICS codes that Federal contracting officers use to classify elevator maintenance, repair, and modernization contracts:

- NAICS 811310—Commercial and Industrial Machinery & Equipment (size standard of \$12 million)
- NAICS 238290—Other Building Equipment Contractors (\$22 million)
- NAICS 236220—Commercial and Institutional Building Construction (\$45 million)
- NAICS 561210—Facility Support Services (\$47 million)
- NAICS 333921—Elevator and Moving Stairway Manufacturing (1,000 employees)

For an elevator modernization/construction contract, the commenter contended that contracting officers typically use either NAICS 238290 or NAICS 236220. Under this scenario, an elevator company can be awarded a modernization project as a small business under NAICS 236220 but would be unable to bid, as a small business, on the maintenance contract under NAICS 238290 because they are considered too “large” under that NAICS industry. The commenter argued that the fact that all elevator companies perform both modernization and maintenance tasks, but are deemed small enough to perform one, but too large to perform the other, is an oversight that should be corrected.

The commenter maintained that every elevator company in the country performs elevator maintenance, repair, modernization, and construction, and recommended that SBA lump all these activities together and create a unique

NAICS code for the elevator industry and establish an employee-based size standard of 1,000 employees. With an elevator-specific NAICS code, there would be no guesswork by contracting officers in choosing an appropriate NAICS code for elevator maintenance, repair, modernization and construction work, the commenter noted. Due to the lack of a single NAICS code representing the elevator industry, the commenter noted that elevator-related contracts (maintenance and modernization) are generally awarded to general contractors, who subsequently subcontract that work out to multi-national, multi-billion, foreign-owned conglomerates operating in the elevator industry. As much as 70–80% of contract value is performed by those conglomerates, the commenter argued.

The commenter proposed that SBA consider, in addition to the Economic Census data, publicly available alternative industry data and industry expertise in determining the size standard for the elevator industry. Based on the industry data the commenter has access to, the commenter provided estimates of various industry factors that SBA evaluates in establishing and reviewing size standards, including the 4-firm concentration ratio (70%) and Gini coefficient (0.90), arguing that these factors support a much higher size standard for the elevator industry. They also noted that generally the elevator industry has significant barriers to entry and higher average firm size due to industry dominance by the largest four firms. The companies that exceed the current size standard of the elevator-related industries cannot compete under full and open competition against the largest competitors that are more than 200 times larger than a small elevator company, the commenter argued.

SBA Response

As stated elsewhere in this document, the Small Business Act requires the size standards to vary from industry to industry to the extent necessary to reflect the differing characteristics among the various industries. When a company operates in closely related multiple industries (such as NAICS 236220 and NAICS 239290), it is not uncommon for it to be considered small in some industries and other than small (“large”) in others. A good example is a company operating both in NAICS 541310, Architectural Services, and in NAICS 541330, Engineering Services. NAICS 541310 has a size standard of \$12.5 million and NAICS 541330 has a size standard of \$25.5 million. Accordingly, the same company may qualify as small under NAICS 541330

but not under NAICS 541310. Thus, the issue of the elevator industry is not unique.

The SBA regulations allow small business general prime contractors to subcontract up to 85% of the value of work, excluding the cost of materials, to companies that are not similarly situated entities (*see* 13 CFR 125.6(a)(3)). Similarly, SBA regulations allow small business specialty trade prime contractors to subcontract up to 75% of the value of work, excluding the cost of materials, to companies that are not similarly situated (*see* 13 CFR 125.6(a)(4)).

SBA’s regulations in 13 CFR 21.406(b) require contracting officers to designate an appropriate NAICS code (along with applicable size standard) that best describes the principal purpose of the product or service being acquired. If it is believed that the contracting officer’s NAICS code designation or size standard is not appropriate, SBA’s regulations in 13 CFR 121.1102 allow the interested parties to appeal that NAICS code designation with the SBA’s Office of Hearings and Appeal (OHA). Procedures for appealing a NAICS code or size standard designation are set forth in 13 CFR 121.1103.

Regarding the commenter’s suggestion that SBA create a new NAICS code representing the elevator industry, SBA does not have authority to create or modify a NAICS code. In collaboration with the Statistical Agencies of the United States, Canada, and Mexico, every five years, the Economic Classification Policy Committee (ECPC) within the Office of Budget and Management (OMB) creates new NAICS codes or revise the existing codes. Any comment or supporting documentation for creating a new NAICS code for the elevator industry should be directed to the ECPC’s comment and notice process for the quinquennial NAICS revisions.⁹

With respect to the suggestion to establish a 1,000-employee size standard for the new NAICS code for the elevator industry, historically SBA has been using receipts, not employees, as a measure of business size for construction-related industries. In industries where subcontracting is high, such as construction-related industries, SBA prefers to use receipts as a measure of size standards. When a prime contractor subcontracts out a portion of a contract, the value of contract being subcontracted out is counted toward prime’s receipts, but subcontractor’s

⁹NAICS Update Process Fact Sheet on the NAICS website at https://www.census.gov/naics/reference_files_tools/NAICS_Update_Process_Fact_Sheet.pdf provides tentative schedules for considerations of changes to NAICS for 2027.

employees doing the work are not counted toward primes' employee count. Thus, an employee-based size standard may lead to excessive subcontracting in those industries.

The Small Business Act limits the SBA's ability to establish a common size standard for related industries, such as elevator maintenance, repair, modernization, and construction industries. The statute permits establishing a common size standard by grouping all industries within the NAICS 4-digit level provided that the data supports the same size standard for each of those industries in the group, which is not the case for industries related to elevator maintenance, repair, modernization, and construction.

As stated elsewhere in this document, the concerns regarding the size standards for specific industries are beyond the scope of the Revised Methodology. The Methodology merely provides an analytical framework for reviewing existing and calculating new size standards. SBA's actual decisions to change or modify size standards are implemented through rulemakings. SBA encourages the commenter to submit their concerns regarding the size standards for specific industries, including any relevant industry data and analysis, by commenting on the forthcoming proposed rules reviewing size standards for their industries.

ITVAR NAICS 541519 (Footnote 18).

An advocacy organization for small and mid-size companies submitted as comment the testimonies of two information technology value added resellers (ITVAR) firms provided to the House Small Business Committee Hearing on size standards, held on February 6, 2024.¹⁰ Both testimonies (commenters) outlined their success as a Federal ITVAR and challenges they face in competing on information technology (IT) procurement opportunities.

The commenters maintained that small business ITVARs play an important role in meeting the Government IT procurement needs in three ways: (1) obtaining IT equipment and supporting services from a single source; (2) acquiring multiple multivendor IT products from a single acquisition; and (3) customizing computer hardware or software. They pointed out that ITVARs provide cost-effective IT solutions to the Government

by serving as an intermediary between the Government and creators of IT hardware and software, usually known as the original equipment manufacturers (OEMs). Besides selling the IT hardware and software, ITVARs also provide the Government with beneficial value-added services, including, but not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support, they added. The commenters have identified the following challenges small business ITVARs face in the Federal marketplace and potential solutions to address them. These are summarized below even though these issues are outside the scope of the Revised Methodology.

Challenges

1. *The changing landscape of the IT procurements.*

The commenters explained that, in 2003, SBA created a new subindustry category or "exception" for ITVARs under NAICS 541519, Other Computer and Related Services, with a size standard of 150 employees (68 FR 74833; December 29, 2003).¹¹ For this, SBA created a new footnote (Footnote 18), which provides a definition of an ITVAR and describes the circumstances under which a procurement could properly be classified under the ITVAR exception and its 150-employee size standard, the commenters noted. When SBA first established the ITVAR exception, IT procurement market was vastly different than it is today, they argued. The commenters contended that selling to the Government then was much simpler and required fewer employees than it does now. They claimed that today Federal customers need much more complex IT solutions that include artificial intelligence (AI), robotics, cybersecurity, and cloud computing. As the focus of Government spending shifts more and more towards innovation and meeting its burgeoning technology needs, small businesses, including small ITVARs, are providing the Government with IT more than ever before, the commenters noted. The

current regulatory landscape includes a patchwork of rules and regulations specific to small businesses and the IT industry that have made it challenging, and in some cases impossible, for small business ITVARs to participate in the Federal market without potentially violating the law, they asserted.

SBA Response

The changing landscape with respect to IT procurements is not necessarily bad for the ITVAR contractors or the Government. With introduction of category management, strategic sourcing, and other initiatives in the Federal market, the changing Federal procurement landscape has touched most sectors and industries with a significant Federal spend. The changing IT landscape of the Federal market has led to improvement and modernization of how agencies purchase IT goods and services, resulting in creation of value, efficiency, and innovation of procurement activities, while reducing risks and costs. By adopting current best practices, agencies can secure cost savings and improve quality of products and services being acquired. SBA small business rules and regulations are intended to serve the interests of small businesses that need Federal assistance the most.

2. *15–50% value-added services requirement.*

Footnote 18 requires an ITVAR classified under NAICS 541519 to provide multivendor hardware and software along with significant value-added services, the commenters asserted. They stated that Footnote 18 provides that an IT procurement classified under the ITVAR exception and its 150-employee size standard must consist of at least 15% and not more than 50% of these value-added services, as measured by the total contract price. However, much of the value-added services provided by ITVARs occur prior to contract award and/or are built into existing pricing and not separately charged, commenters contended. Commenters asserted that, under the current rule, measuring the percent of value-added services as compared to the total contract price, the 15–50% value-added requirement is unrealistic and will increase the costs to the Government. They argued that ITVARs generally do not charge separately for value-added services whose costs are incorporated into the company's overhead costs. As such, the value-added services often do not account for 15% of the total contract price, they noted.

¹⁰ Those testimonies are available in entirety at the following links: <https://www.congress.gov/118/meeting/house/116800/witnesses/HHRG-118-SM00-Wstate-MooreB-20230206.pdf>; <https://www.congress.gov/118/meeting/house/116800/witnesses/HHRG-118-SM00-Wstate-LambkeJ-20230206.pdf>.

¹¹ For Federal contracts that combine substantial services with the acquisition of computer hardware and software, in 2002, SBA proposed establishing a new ITVAR subindustry or "exception" category under NAICS 541519, Other Computer Related Services, with a size standard of 500 employees (67 FR 48419; July 24, 2002). SBA received a total of 291 comments, of which 276 or 95% opposed the proposed 500-employee size standard for the newly created ITVAR exception in support for a smaller size standard. In the final rule, SBA adopted 150 employees.

SBA Response

Footnote 18 provides that if the contract consists of less than 15% of value-added services, then it must be classified under a manufacturing NAICS industry. If the contract consists of more than 50% of value-added services, then it must be classified under the NAICS industry that best describes the predominate service of the procurement. If it is believed that the NAICS code contracting officers designate to a solicitation is not correct, SBA regulations in 13 CFR 121.1102 allow the interested parties to appeal the contracting officer's decision to SBA's Office of Hearings and Appeal (OHA).

3. *The nonmanufacturer rule (NMR) and waivers.*

The commenters noted that, under Footnote 18, an ITVAR contractor must comply with the NMR. They stated that this is a change to the regulation SBA made in 2016 (81 FR 4436; January 26, 2016). Prior to this, an ITVAR contractor was not subject to the NMR, they argued. The commenters maintained that specific to supply contracts, the NMR allows a small business to supply products it did not manufacture if certain requirements are met, including that the supplied products were manufactured by another small business. They stated that small businesses may supply products manufactured by any size business if the SBA grants a waiver of the NMR. In most cases, the Government requires the ITVARs to provide computer hardware and software manufactured or produced from large OEMs, they argued. Thus, applying the NMR to procurements of IT products presents several challenges for small business ITVARs and, in many cases, is inconsistent with what agencies specifically require in their solicitations, they contended. The commenters argued that while class waivers exist for some hardware, currently, there are no class waivers for software products. Thus, a small business ITVAR cannot participate in opportunities involving the purchase of commercial software manufactured by large businesses even where the Government specifically requires such software, they reasoned. Rather, small businesses can participate in such opportunities only when the contracting officer requests an individual waiver, the commenters claimed. Notably, it is not mandatory for the contracting officer to request an individual waiver, they noted. They contended that, in most cases, the contracting officer will choose not to seek a waiver, even if the acquisition is set up as a small business set-aside for product for which there is

no small business manufacturer. They declared that this practice flies in the face of established rules and sets up unwary ITVAR contractors to violate the NMR (and, potentially, the False Claims Act) simply for following the requirements set forth by the Government.

SBA Response

If a small business set-aside IT procurement classified under the ITVAR exception includes products for which there are no small businesses manufacturing the product being acquired, SBA regulations in 13 CFR 121.406(b)(5) allow the contracting officers, and in some cases the public, to request a waiver of the NMR from SBA. There are two types of waivers of the NMR: class waivers and individual waivers. SBA grants a class waiver only upon its determination that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market. SBA issues an individual waiver if the Agency determines that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications (including period for performance) required by a particular solicitation.¹² The procedures for requesting and granting these waivers are set forth in 13 CFR 121.1204.

4. *Inappropriate use of NAICS.*

The comments stated that the Government uses the NAICS codes to identify the purpose of a procurement and to identify the size standard a business must meet to qualify as small for that procurement. When issuing solicitations, contracting officers must designate a single NAICS code that best describes the principal purpose of the product or service being acquired, they attested. They argued that, often, an IT procurement may be a mixed procurement, involving both products and services. However, the contracting officer still must assign a single NAICS code according to the component that accounts for the greatest percentage of contract value, they asserted. The commenters argued that this causes problems for ITVARs that provide both products and services. ITVARs offer computer hardware or software and/or services that reasonably can be classified either under a supply or a service NAICS code, they declared. They argued that the existing NAICS codes are not appropriate for small

business ITVARs. Establishments that primarily provide services are classified under a service NAICS code, they added. The commenters maintained that small business ITVARs primarily provide computer hardware, software, and related products (supplies) along with some services that cannot be classified under the service NAICS codes. Likewise, the supply codes cover establishments that manufacture a specific product, they argued. Commenters contended that since products ITVARs provide often are manufactured by other companies, small business ITVARs do not fit neatly under the supply NAICS codes either.

SBA Response

SBA's regulations in 13 CFR 121.402(b) require contracting officers to designate an appropriate NAICS code that best describes the principal purpose of the product or service being acquired. If it is believed that the contracting officer's NAICS code designation is not appropriate, SBA's regulations in 13 CFR 121.1103 allow the interested parties to appeal that NAICS code designation to the SBA's Office of Hearings and Appeal (OHA). As stated elsewhere in this document, the nonmanufacturer rule allows contractors to supply products that they did not manufacture or produce.

Recognizing that the ITVAR exception has led to misuse, inconsistency, and confusion with respect to designation of NAICS codes for ITVAR solicitations by contracting officers, in 2014, as part of the first 5-year review of size standards under the Jobs Act (79 FR 53646; September 10, 2014), SBA proposed eliminating the ITVAR exception (and Footnote 18) to address those issues. By definition, ITVAR contracts account for 15–50% of value-added services and 50–85% of computer hardware and software (supplies). Thus, by definition, the ITVAR exception is for contracts that are primarily for supplies, with some services. As stated in the 2014 proposed rule, if the ITVAR exception is eliminated, all ITVAR contracts would be reclassified under the employee-based size standard for the manufacturing industries or under the 500-employee NMR size standard. IT procurements with more than 50% of services will be appropriately classified under services NAICS codes. However, in response to overwhelming comments against eliminating the ITVAR exception, in the final rule, SBA retained the ITVAR exception along with 150 employees, but subjected the supply component of the ITVA contracts to manufacturing requirements

¹² SBA has granted several individual waivers for software products under NAICS 513210, Software Publishers.

and the NMR (81 FR 4436; January 26, 2016).

5. *Increased compliance requirements.*

With changes in IT procurement landscape, the burden placed on ITVARs has increased drastically as well, the commenters explained. They argued that numerous employees are needed for compliance. ITVARs are required to obtain a wider breadth of knowledge with multiple OEMs than an IT service company would, they contended. They claimed that small business ITVARs are not exempt from these requirements from the Government nor from the OEMs. They held that to stay under the 150-employee size standard, small business ITVARs must sacrifice hiring at the expense of obtaining and maintaining Government mandated certifications, or forgo obtaining required certifications with the OEMs, which hurts the portfolio of products they are able to offer and also negatively affects their pricing discounts and profitability. With an increased focus on secure supply chain and numerous certification requirements (such as International Organization for Standardization (ISO) certifications, cybersecurity maturity model certification (CMMC), supply chain risk management, ITAR, security clearances, affirmative action and others), ITVARs must now hire employees to manage compliance, the commenters contended. They argued that OEM partners also require ITVARs to hold advanced certifications to be authorized to sell their products. Government customers also require advanced OEM certifications to bid on certain procurements, they added. It is often difficult for small business ITVARs to navigate these issues particularly, where the Government has set aside a procurement based on an inappropriate NAICS code, the commenters noted.

SBA Response

Maintaining compliance is not unique to delivering IT goods and services to Government agencies under the ITVAR exception. Contractors providing goods and services in other industries are also required to ensure that they comply with applicable existing law and regulations. Larger small businesses are likely to maintain in-house specialized workforce dedicated to carry out compliance work, while smaller small business are likely to hire external consultants and attorneys. Achieving compliance with regulations, law and other requirements would reduce the ITVAR contractors' risks of violating law and facing fines, debarment, or

other penalties. Compliance with applicable law and regulations would also provide confidence to the Federal clients, thereby increasing the likelihood of winning Federal contracts. Requirements for increased knowledge, qualifications/certifications, and capabilities to participate in the delivery of IT products can not only enhance the quality of IT goods and services being procured by the Government by ensuring that they meet its specifications and standards, but also enhance contractors' ability to meet Government needs.

6. *Industry consolidation and size standard.*

The commenters stated that there is increased consolidation and acquisitions in the ITVAR industry. It is common for ITVARs, once they exceed 150 employees, to sell their businesses, they argued. The commenters contended that these ITVARs, who usually have years of experience in Government contracting and proven capabilities, are purchased by larger industry competitors or private equity firms. There has been a mass exodus of firms from the industry once they exceed the size standard, they asserted. They argued that this hurts the Federal agencies as they lose small businesses and qualified suppliers who are often replaced with less qualified and less capable suppliers. The unicorn in the ITVAR industry has become those companies with between 151 employees and 500 employees, they noted. They claimed that to go from successfully competing as a small business to competing with large companies, like CDW and IBM, is an improbable endeavor for a small ITVAR. The result is an erosion of the supplier base that has valuably served the Government, the commenters argued. Not only does the Government suffer under this scenario, but so do the employees and the communities where these businesses are located as the acquiring companies or private equity firms are headquartered in larger metropolitan areas, the commenters contended. They pointed out that increasing the employee size limit to 500 employees would insure there are ample small businesses that are qualified to meet the increasing demands of today's Government customers.

SBA Response

The commentary that small businesses, once they exceed their size standards, are acquired by large corporations or private equity firms is not unique to ITVAR firms. SBA frequently receives such concerns from businesses in other industries as well.

SBA believes that such concerns would remain regardless of how high the size standards are. For example, SBA's recent increases to size standards have not alleviated these concerns. SBA increased 604 size standards under the first 5-year review of size standards and 436 size standards under the second 5-year review of size standards. Additionally, SBA has periodically increased its monetary-based size standards for inflation. SBA also has increased the averaging periods for calculating annual receipts for size standards from 3 years to 5 years and for calculating the average number of employees for size standards from 12 months to 24 months, thereby extending the runway for small businesses to successfully transition from small business to mid-size or large business status in the Federal marketplace. With respect to the commenter's suggestion to increase the ITVAR size standard to 500 employees, SBA will review that size standard as part of the forthcoming third 5-year review of size standards under the Jobs Act and determine if it needs to be revised. The commenters are advised to submit their comments when SBA issues a proposed rule with the results of its analysis.

7. *Limitations on subcontracting rule.*

The commenters maintained that, for both supplies and services, the limitations on subcontracting rule ("LOSR") requires that a small business not subcontract more than 50% of the prime contract amount to businesses that are not "similarly situated." In contracts for mixed procurements (*i.e.*, both supplies and services), the LOSR applies only to subcontracts that correspond to the principal purpose of the prime contract, they argued. The commenters contended that the LOSR is problematic for small business ITVARs that resell to the end-user IT products (*e.g.*, hardware, computers, etc.) and/or services (*e.g.*, cloud, hardware/software maintenance, etc.) that mostly originate from other companies. Often, the products and services the Government requires under the ITVAR solicitation are provided only by large companies, and easily exceed 50% of the total contract amount, the commenters reasoned. Thus, the commenters argued, the LOSR has the effect of eliminating small business ITVAR participation in many Federal acquisitions for IT products and services although they are set-aside for small businesses.

SBA Response

In accordance with SBA's regulations in 13 CFR 125.6(a)(2), procurements of supplies from a nonmanufacturer of such supplies are exempt from the

LOS. In other words, the NMR supersedes the LOS. In the case of a contract for supplies from a nonmanufacturer, a small business will comply with all requirements at 13 CFR 121.406(b)(1) to qualify as a nonmanufacturer, including supplying the product of a domestic small business manufacturer or processor, unless a waiver is granted pursuant to SBA's regulations in 13 CFR 121.406(b)(5). If a waiver is granted, the offeror is not required to comply with the NMR requirements.

8. *Potential liability for small businesses.*

The commenters contended that the Government regularly issues solicitations under inappropriate NAICS codes, thereby inviting small business ITVARs to violate the Small Business Act and exposing them to risk of fines, debarment, or other penalties. There is little compliance oversight by the Government with respect to NAICS codes, they claimed. Rather, the onus has shifted to small business ITVARs to use scarce time and resources to police Government agencies via NAICS code protests, the commenters stated. They held that relying on protests to check this frequent misuse is unrealistic, costly, and unfair for small business ITVARs. Another issue facing small business ITVARs is misapplication of the ITVAR code, for example, as when the contract includes services that account for less than 15% of the total contract price, the commenters argued. They mentioned that, in this situation, small business ITVARs can choose to bid, knowing they will not provide value-added services that account for 15–50% of the total contract price as required by the ITVAR exception, and thus potentially setting themselves up for an allegation that they have violated the law or made a false certification. Or, the small business can forgo the opportunity altogether, while less risk-averse competitors are awarded the work, the commenters argued. Where a small business ITVAR contractor is not compliant with the SBA regulations, it is susceptible to size protests, potential suspension or debarment, or False Claims Act liability, they pointed out. Thus, simply by submitting a proposal where the business cannot comply with the NMR, or with the 15–50% service requirement under the ITVAR exception, a small business contractor could potentially expose itself to False Claims Act liability, suspension or debarment, a size protest by a competitor, contract termination, and loss of business, the commenters declared.

SBA Response

Pursuant to SBA's regulations in 13 CFR 121.402(b), Federal agencies are required to select a single NAICS code for an acquisition that best describes the principal purpose of the service or product being acquired. If businesses believe that the NAICS code selected by the contracting officer for the contract is inappropriate, pursuant to 13 CFR 121.1103, they can file a NAICS code appeal with the SBA's Office of Hearings and Appeals (OHA). However, because contractors do not have affirmative responsibility for ensuring that the NAICS code selected by a contracting officer is appropriate, they are not liable for bidding on or performing solicitations for which the NAICS code selected by the contracting officer is inappropriate. The determination on whether an ITVAR contract meets the 15–50% service requirement is made prior to the award and does not become the terms and conditions of the contract. Accordingly, small business ITVAR contractors may not be liable even though value-added services account for less than 15% or more than 50% of the contract value. However, when the NMR requirement falls under the terms and conditions of the contract, small ITVARs are bound to comply with the NMR unless there is a waiver.

9. *Software NAICS 513210 (Footnote 15).*

The commenters maintained that, in 2016, SBA promulgated a new rule relating to NAICS 513210, Software Publishers, providing that unmodified, commercially available software supplied in procurements under that NAICS code is an item of supply rather than a service, thus subjecting these items to the NMR (81 FR 34243; May 31, 2016). The commenters stated that, for this, the SBA created a new footnote (Footnote 15), which explains that NAICS 513210 is the proper NAICS code to use when the Government is purchasing COTS (“commercial-of-the-shelf”) software, which is eligible for a waiver of the NMR. The Characterization of COTS software as a product subject to the NMR presents the added complication of seemingly conflicting size standards applicable to these procurements, the commenters reasoned. NAICS 513210, a services code, has a revenue-based size standard of \$47 million, while a company may also qualify as small under the NMR based on a size standard of 500 employees, they noted.

The commenters pointed out that one consequence of changing the classification for COTS software to a

supply was that the NMR then became applicable to procurements for this type of software, and waivers then could be sought. The 2016 rule amended the SBA's regulations that SBA may grant an individual waiver for the procurement of software, provided that the software meets certain conditions, the commenters noted. The commenters held that individual waivers may be requested by contracting officers and the public can request that SBA issue class waivers for software items. However, they argued that, in practice, contracting officers have been reluctant to request a contract specific waiver, and, to date, no class waivers for software have been granted.

Commenters contended that a class waiver for the Footnote 15 portion of NAICS 513210 would be appropriate for resolving many of the issues facing small business ITVARs for four reasons: (1) the COTS software procured under NAICS 513210 is overwhelmingly manufactured by large businesses that it obviates the purpose of the NMR; (2) the small business set-asides are almost universally in violation of the NMR; (3) these violations are almost forced by the Government's dual need for both large business software and small business credit, leading to improper solicitations; and (4) this situation invites small businesses to expose themselves to the risk of misrepresenting their size status.

The commenters pointed out that the Government regularly posts solicitations for acquisitions of COTS software manufactured by large businesses that are classified under NAICS 513210 and set-aside for small businesses. The NMR applies to these solicitations unless the contracting officer has obtained a waiver from SBA, the commenters argued. If a waiver is granted, the solicitation can be set-aside for small businesses, and the small business awardee can provide an end-product made by any size manufacturer, they added. In practice, waivers are rarely obtained, the commenters argued. They asserted that if the solicitations do not include a waiver of the NMR, any small business awardee must provide an end-product made by a small business manufacturer. In many instances, this is not possible because the Government often specifically requests items manufactured exclusively by large businesses, or because certain products are not manufactured by small businesses, the commenters argued. They contended that, without a waiver, any small business awardee that provides the required COTS software (manufactured by a large business) under a set-aside is violating the Small Business Act, opening itself to liability

under the False Claims Act for making false statements and certifications to the Government, and subjecting itself to a host of other negative consequences—all at the behest of the Government agency.

SBA Response

SBA grants a class waiver of the NMR for a class of products or supplies only upon the determination that no small business manufacturer or producer is available in the Federal market for such products or supplies. The procedures for requesting and granting class waivers are contained in 13 CFR 121.1204. Any interested person, business, association, or Federal agency may submit a request for a waiver for a particular class of products. Requests should be addressed to the Director, Office of Government Contracting, Small Business Administration, 409 3rd Street SW, Washington, DC 20416. Requests for a waiver of a class of products should include a statement of the class of products to be waived, the applicable NAICS code, and detailed information on the efforts made to identify small business manufacturers or processors for the class of products. If SBA decides that there are small business manufacturers or processors in the Federal procurement market, it will deny the request for waiver, issue notice of the denial, and provide the names, addresses, and telephone numbers of the sources found. If SBA does not initially confirm the existence of small business manufacturers or processors in the Federal market, it will: (i) publish notices in the Commerce Business Daily and the **Federal Register** seeking information on small business manufacturers or processors, announcing a notice of intent to waive the NMR for that class of products and affording the public a 15-day comment period; and (ii) if no small business sources are identified, publish a notice in the **Federal Register** stating that no small business sources were found and that a waiver of the NMR for that class of products has been granted. SBA may expedite the procedure for issuing a class waiver under emergency situations (see 13 CFR 121.1204(5)). SBA has granted several individual waivers for the COTS software under NAICS 513210. If commenters feel that SBA can reasonably issue a class waiver for this code, then an interested party should request one and provide the required documentation.

Proposed Solutions

The commenters declared that the current system for classifying and executing procurements involving ITVARs has serious flaws that should be

addressed. They stated that any comprehensive solution must: (1) create a new industry by recognizing what ITVARs actually do (*i.e.*, the type and mix of services and products they provide); (2) capture and account for how services currently are billed to the Government, and eliminate the 15–50% value-added requirement; (3) provide a realistic size standard that is not over- or under-inclusive; and (4) address the NMR requirements for COTS procurements.

1. *Creation of the new NAICS code.*

The commenters pointed out that, while there are a number of possible solutions, the most viable and sensible solution is to create a new NAICS code that accurately captures the core competency of the ITVAR, accompanied by creation of an appropriate SBA size standard and elimination of the ITVAR exception at Footnote 18. They contended that the new code should focus on the ITVAR's role as a consultant that provides pre-sales engineering and subject matter expertise on a variety of software and hardware products. Ideally, the Economic Classification Policy Committee (ECPC) within OMB will create a new, stand-alone NAICS code for ITVARs, they noted. Once established, the SBA should then revise its current size standard accordingly and eliminate Footnote 18 under NAICS 541519, the commenters added.

SBA Response

In 2014, because of inconsistencies, confusion and misuse surrounding the application of NAICS codes for ITVAR contracts, SBA proposed to eliminate the ITVAR exception, along with its 150-employee size standard and the accompanying footnote (Footnote 18) under NAICS 541519 (79 FR 53646; September 10, 2014). SBA received a total of 168 comments, of which 163 opposed the SBA's proposal. In response, SBA retained the 150-employee size standard and Footnote 18, while subjecting the supplies component of an ITVAR contract to the manufacturing performance requirements and the NMR.

Any documentation and information in support of the creation of a new NAICS for the ITVAR industry should be directed to the ECPC within OMB. As stated elsewhere in this document, in collaboration with Statistical Agencies from the U.S., Mexico and Canada, the ECPC, every 5 years, creates new NAICS codes or revises the existing ones. The NAICS website has established a factsheet regarding the time schedules for the 2027 NAICS revisions.

2. *Elimination of the 15–50% service requirement.*

The commenters contended that the SBA's size standard for the new NAICS code must not include a service requirement that is based on a percent of the total contract price, but it should be based on value-added services provided by a typical ITVAR. The commenters noted that the current ITVAR 15–50% services requirement ignores the reality in following ways: (1) the fixed cost of the component far exceeds the cost of the services and implementation of equipment, and (2) the provided services generally are not separately billed. The commenters stated that ITVARs provide valuable services to the Government, but the costs of those services are included in overhead costs, covered by narrow margins on the IT products, and not separately charged. Therefore, the current requirement that services account for 15–50% of the total contract price is unattainable and should be eliminated under the new size standard, the commenters argued.

SBA Response

The 15–50% service requirement provides that if the contract consists of less than 15% of value-added services, then it must be classified under a manufacturing NAICS industry. If the contract consists of more than 50% of value-added services, then it must be classified under the NAICS industry that best describes the predominate service of the procurement. SBA is concerned that eliminating the 15–50% requirement would lead the contracting officers to improperly apply the ITVAR exception, instead of the manufacturing NAICS code, to IT procurements where the value-added services account for less than 15% of the contract value. Similarly, the elimination of the 15–50% requirement would encourage the contracting officers to use the ITVAR exception, at the expense of small business services firms, for IT acquisitions that account for more than 50% of value-added services.

3. *Revision to the size standard.*

As soon as practicable, after the new NAICS code is established, SBA should revise its size standard to account for the new NAICS code and institute an appropriate employee-based size standard, the commenters argued. Recognizing that ITVARs typically operate on low margins even though their annual receipts may be high, the size standard should be based on employee count rather than annual revenue, the commenters reasoned. The commenters attested that a reasonable

size standard for the new code is 500 employees.

SBA Response

It should be noted that SBA proposed a 500-employee size standard when it first created the ITVAR exception (67 FR 48419; July 24, 2002). As discussed in detail in the final rule (68 FR 74833; December 29, 2003), of a total of 291 comments received, 276 or 95% of comments opposed the proposed 500-employee size standard for the ITVAR exception in support of a smaller size standard. Commenters argued that businesses with 500 employees are not small in the ITVAR industry, and that smaller IT businesses are not competitive against businesses with hundreds of employees. The commenters contended that, under the proposed 500-employee size standard, Federal agencies are more likely to award ITVAR contracts to the larger small businesses at the expense of much smaller businesses. Several comments considered a 500-employee ITVAR firm to be dominant in this field, and therefore does not meet the Small Business Act's statutory definition of a small business which excludes dominant businesses as small. Finally, the commenters argued that a vast majority of firms engaged in the ITVAR industry are much smaller than 500 employees. Commenters to the 2014 proposed rule (79 FR 53646; September 10, 2014) that proposed eliminating the ITVAR exception (along with Footnote 18) validated the above concerns.

4. Elimination of the NMR requirements.

With respect to qualifying as a small business under the new NAICS code, SBA should acknowledge that the NMR is explicitly inapplicable, the commenters argued. Because ITVARs, by definition, do not manufacture the products they resell, it is nonsensical to require them to comply with the NMR—particularly where solicitations overwhelmingly seek COTS items manufactured by large businesses, the commenters held. They maintained that both the ITVAR code (NAICS 541519, Footnote 18) and the COTS code (NAICS 513210, Footnote 15) require compliance with the NMR, but allow for waivers of the NMR. Rather than eliminating the NMR with respect to procurements using these codes, SBA opted to put the onus on agencies to seek waivers, they noted. In practice, this has not been a viable solution, as shown by how ineffective and underutilized the waiver has been to date, the commenter argued. Contracting officers have been reluctant to request contract specific waivers and, to date,

no class waivers for software have been granted, they added.

SBA Response

Considering the rapid pace of development in the IT industry, SBA believes that it is not unreasonable to assume that there will be new products purchased by the Federal Government using the ITVAR exception in the future that will be manufactured by small businesses. Thus, by eliminating the NMR for the ITVAR exception, SBA could disadvantage small firms who are currently offering, or plan to offer products to the Government. SBA also believes it would be inconsistent with the intent of the Small Business Act if ITVAR resellers could provide the supplies produced primarily by large OEMs, or other large manufacturers, without the NMR. SBA is concerned that without the compliance with the NMR, the ITVAR exception may allow small business ITVARs to simply serve as “pass throughs” for large OEMs and other large manufacturers. While SBA recognizes that the NMR may work better for some products than for others, it strongly believes that the rule must apply to all supply contracts equally. Thus, like all other products and supplies, the nonmanufacturer rule must also apply to IT products, including those purchased through the ITVAR exception.

5. Blanket waivers.

The commenters stated that a separate work-around involves obtaining waivers. One way to allow small businesses to supply software manufactured by large corporations is to secure an individual waiver issued for a vehicle that covers a full array of IT orders of a Government department, the commenters contended. They noted that, in 2020, the Department of Homeland Security (DHS) obtained an individual waiver from SBA for all the products and services to be procured under the FirstSource III. Under FirstSource III, any commercial IT product would be available, including products manufactured by large companies, they added. The commenters pointed out that, notably, FirstSource III will have two NAICS codes, NAICS 541519 (ITVAR) and NAICS 513210 (Software Publishers). To resolve the NMR issues, DHS is pursuing an individual contract level NMR waiver for FirstSource III, the commenters added. If SBA approves the waiver, there would be no need for individual waivers for each order under FirstSource III, the commenters reasoned. They attested that DHS's attempt to secure a blanket waiver for the FirstSource III contract signals the

Government's recognition of the need to change the rules to adapt to the evolving IT landscape. The commenters argued that a broader change is warranted for other types of IT procurements, particularly for those involving small business ITVARs.

SBA Response

As explained above, SBA's regulations in 13 CFR 121.1204(a) allow Federal agencies to request for class waivers of the NMR from SBA if they, based on market research, demonstrate that there are not small businesses that manufacture or produce a class of IT hardware and software. For example, in 2020, SBA granted a class waiver of the NMR for commercially available off-the-shelf laptops and tablet computers under NAICS 334111, Electronic Computer Manufacturing (85 FR 13692; March 9, 2020). Procedures for requesting individual waivers are laid out in 13 CFR 121.1204(b). SBA has granted several individual waivers for the COTS software under NAICS 513210 and computer hardware and software under NAICS 541519.

D. Public Forums

As mandated by section 1344 of the Jobs Act, SBA is required to hold not less than two public forums during its quinquennial review of size standards. SBA held two virtual public forums on size standards to update the public on the status of the ongoing five-year reviews of size standards under the Jobs Act and to consider public feedback on changes contained in the Revised Methodology. The two virtual public forums were held on January 23, 2024, and on January 25, 2024. Over the course of the two days, of 44 total participants, SBA received testimony from one commenter, mostly relating to the SBA's approach to evaluating the size standard for the ERS exception under NAICS 562910, Remediation Services. The comment received during the virtual public forums is included in the count of comments above.

The comment expressed general support for the SBA's Revised Methodology and its data-driven approach to size standards. The commenter argued, unlike other “exceptions” that are NAICS subindustry categories, the ERS exception is a superindustry category, because it consists of activities from several different NAICS industries. The commenter expressed concern over SBA's approach to creating the ERS industry by trimming the largest environmental companies for which the ERS work is not a primary source of their total revenues. The commenter

argued that large competitors in the ERS industry have a serious advantage over smaller businesses in terms of winning and executing work, even where only a small portion of their total revenue comes from ERS work. Large firms can leverage their vast resources, extensive experiences and economies of scale that give them a tremendous competitive advantage over a small business making roughly similar revenue. Thus, SBA should not trim such companies, the commenter noted. If SBA believes that trimming is necessary, it should provide a list of companies that were trimmed so that the public can comment on its analysis, the commenter added. The commenter also urged SBA to let the data drive the results rather than policies. The commenter also submitted a more detailed comment to www.regulations.gov, which has been summarized above.

SBA response: SBA has responded to the ERS concern above.

E. Conclusion

As discussed above, SBA proposed two changes to the Methodology: (1) adoption of the disparity ratio approach to account for the small business participation in the Federal market; and (2) use of the FPDS-NG and SAM data to calculate the 20th percentile and 80th percentile values of industry factors to evaluate the size standards at the subindustry levels, usually known as “exceptions.”

SBA received four comments supporting the adoption of the disparity ratio approach to measure small business participation in the Federal market. SBA received three comments addressing the second issue, with one supporting the SBA’s proposal to use FPDS-NG and SAM data to derive the 20th percentile and 80th percentile values of industry factors to evaluate exception size standards and two opposing it. As stated elsewhere, the data from the Census Bureau’s Economic Census tabulation are limited to the six-digit NAICS industry level and therefore do not provide information on economic characteristics of firms at the subindustry level. Thus, SBA uses the FPDS-NG and SAM data to derive the industry factors for exceptions. Therefore, to be consistent, SBA is adopting FPDS-NG and SAM data to obtain the 20th percentile and 80th percentile values of industry factors for evaluating size standards for the NAICS exceptions, instead of using the percentiles from the Economic Census. As such, SBA is adopting both proposed changes in the Revised Methodology.

Several commenters submitted comments pertaining to size standards for specific industries, including the ITVAR exception to NAICS 541519, the ERS exception to 562910, Software Publishers (NAICS 513210), and a few other industries. Comments pertaining to specific size standards are beyond the scope of the Methodology. Those commenters have been advised to submit their comments when SBA issues proposed rules as part of the third 5-year review of size standards under the Small Business Jobs Act of 2010.

Isabella Casillas Guzman,
Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–1556; Airspace
Docket No. 24–ASW–12]

RIN 2120–AA66

Establishment of Class E Airspace; Langtry, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Langtry, TX. The FAA is proposing this action to support new public instrument procedures.

DATES: Effective date 0901 UTC, December 26, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at www.regulations.gov using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

FAA Order JO 7400.11H, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Raul Garza Jr., Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5874.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace extending upward from 700 feet above the surface at 4M Ranch Airfield, Langtry, TX, to support instrument flight rule operations at this airport.

History

The FAA published an NPRM for Docket No. FAA 2024–1556 in the **Federal Register** (89 FR 46339; May 29, 2024), proposing to establish the Class E airspace at Langtry, TX. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. One comment was received. The commenter asked if the surrounding private airfields will also be considered for Class E airspace. The FAA only considers airports for Class E airspace establishment to support instrument flight rule operations at an airport.

Incorporation by Reference

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023 and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.