



POLICY ISSUE

(Notation Vote)

December 7, 2020

SECY-20-0111

FOR: The Commissioners

FROM: Cherish K. Johnson
Chief Financial Officer

SUBJECT: RULEMAKING PLAN TO AMEND THE RECEIPTS-BASED NRC SIZE STANDARDS (NRC-2014-0264)

PURPOSE:

The staff requests Commission approval to initiate a rulemaking to amend the U.S. Nuclear Regulatory Commission's (NRC's) small business size standards in Title 10 of the *Code of Federal Regulations* (10 CFR) 2.810, "NRC size standards," and 10 CFR 171.16(c), "Annual fees: Materials licensees, holders of certificates of compliance, holders of sealed source and device registrations, holders of quality assurance program approvals, and government agencies licensed by the NRC." The staff will modify the methodology for calculating average gross-receipts used by licensees to qualify as small entities pursuant to the regulations of the Small Business Administration (SBA),¹ as amended in response to the Small Business Runway Extension Act of 2018 (Runway Act).² Additionally, the staff proposes to amend the upper and lower tier receipts-based size standards to reflect inflation adjustments that are consistent with the adjustments made by the SBA in July 2019.³

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¹ Small Business Size Standards: Calculation of Annual Average Receipts, Final Rule (84 FR 66561; December 5, 2019).

² Public Law (Pub. L.) 115–324, "Small Business Runway Extension Act of 2018."

³ Small Business Size Standards: Adjustment of Monetary-based Size Standards for Inflation, Interim Final Rule (84 FR 34261; July 18, 2019).

SUMMARY:

The NRC last revised 10 CFR 2.810 in fiscal year (FY) 2012 to reflect the SBA upper tier receipts-based small business size standard, which increased from \$6.5 million to \$7.0 million.⁴ In the FY 2013 final fee rule, the agency amended 10 CFR 171.16(c) to increase the lower tier receipts from \$450,000 to \$485,000 based on the percent change in the upper tier.⁵ Thus, the agency made inflation adjustments to the gross-receipts tiers consistent with SBA adjustments.

As discussed in this paper, the staff proposes to amend 10 CFR 2.810 and 10 CFR 171.16(c) to increase the NRC's upper tier receipts-based small business size standard from \$7.0 million to \$8.0 million for small businesses and small not-for-profit organization in order to remain consistent with the inflation adjustments made to the SBA's size standard for nonmanufacturing concerns. In addition, the staff proposes to amend 10 CFR 171.16(c) to increase the lower tier receipts-based standard from \$485,000 to \$555,000 based on the percent change in the upper tier.

Finally, to be consistent with SBA regulations, as amended in response to the Runway Act, the staff will also change regulations on the calculation of annual average receipts for the receipts-based NRC size standard for small businesses not engaged in manufacturing from a 3-year averaging period to a 5-year averaging period.⁶ These proposed amendments would conform to the standard set by the SBA for nonmanufacturing industries in 13 CFR Part 121, "Small Business Size Regulations."⁷

BACKGROUND:

The NRC first established its industry-specific size standards under 10 CFR 2.810 in the early 1980s when implementing the requirements of the Regulatory Flexibility Act of 1980, as amended (RFA).⁸ The RFA requires agencies to consider the impact of rulemaking on small entities and, consistent with applicable statutes, study alternatives to minimize these impacts on applicable businesses, organizations, and government jurisdictions. At the time, the NRC found that the SBA's size standards, which were based upon the Standard Industrial Classification (SIC) codes (subsequently replaced by the North American Industry Classification System (NAICS) codes), did not readily fit NRC licensees in a way that could be applied fairly and equitably. The codes were not suitable because they were originally designed and intended for the collection of economic data.⁹ Eventually, the SBA's size standards were also used to determine whether a business qualifies as small and "define the largest size a business can be to participate in government contracting programs and compete for contracts reserved or set aside for small businesses and vary by industry."¹⁰

⁴ Receipts-Based, Small Business Size Standard; Direct Final Rule (77 FR 39385; July 3, 2012). This size standard reflects the most commonly used SBA size standard for nonmanufacturing industries.

⁵ Revision of Fee Schedules; Fee Recovery for Fiscal Year 2013 (78 FR 39479; July 1, 2013).

⁶ The staff is not proposing to change the receipts timeframe for small not-for-profit organizations since the size standard is based on annual gross-receipts and not average receipts.

⁷ See *also* Small Business Size Standards: Calculation of Annual Average Receipts, Final Rule (84 FR 66561; December 5, 2019).

⁸ 5 U.S.C. 601 et seq.

⁹ The SBA currently uses the NAICS six-digit levels as bases for industry definitions for size standards. Accordingly, the SBA establishes size standards for more than 1,000 categories (SBA's Size Standards Methodology, page 12, footnote 7, issued April 2019).

¹⁰ *Size Standards*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-guide/size-standards> (last visited November 20, 2020).

The NAICS codes were not designed in a way for the NRC to readily apply to the nuclear industry for the purpose of assessing or reducing fees. Additionally, the NRC classifies its small business licensees by their use of nuclear materials, which does not align with the NAICS codes because the NRC's materials categories cover a mix of industries. In the original analysis of materials licensees in the 1980's, the NRC found that materials licenses could fall into more than 30 different SIC code categories.¹¹ Therefore, the NRC determined it was appropriate for the agency to establish separate size standards that are more consistent with the NRC's regulatory activities. After surveying its materials licensees to create an economic profile that would enable the agency to consider regulatory alternatives for various categories of licensees based on their size, the NRC established its small business size standards in accordance with the requirements in 13 CFR 121.903, "How may an agency use size standards for its programs that are different than those established by SBA?"¹²

In FY 1991, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90)¹³ required the NRC to recover 100 percent of its budget authority by assessing license, inspection, and annual fees.¹⁴ In the FY 1991 final fee rule, in accordance with the RFA, the NRC's nuclear industry-specific size standards were first applied to small entity annual fees in 10 CFR Part 171.16(c).¹⁵ In establishing the FY 1991 fee rule, the NRC determined that the annual fees would have a significant impact on a substantial number of small material licensees. Thus, the NRC established a small entity fee policy, a subsidy program whereby small entities would pay a reduced annual fee. In FY 1992, the NRC established a second tier in 10 CFR 171.16(c) to benefit the licensees that were very small businesses, which continued to retain a balance between the requirement to collect 100 percent of the NRC budget and the requirement to consider means of reducing the impact of the fee on small entities.¹⁶

Approximately a decade after its first survey, in 1993, the NRC completed a second survey to update the economic profile of its materials licensees and used the survey results to evaluate the continued efficacy of the NRC's size standards. This survey also obtained information to determine the necessity for adjusting the size standards. Subsequently, the NRC revised its size standards.¹⁷ The revised size standards included separate standards for business concerns that are manufacturing entities, adjusted its receipts-based size standard to accommodate inflation, eliminated a separate size standard for private-practice physicians, and applied the revised receipts-based size standard to this class of licensees. In the intervening years, the NRC revised its receipts-based size standards as a result of the SBA's inflation adjustments to its own size standards. The SBA assesses the impact of inflation on its standards at least every 5 years, if necessary, or more frequently.¹⁸

¹¹ NRC Size Standard for Making Determinations Required by the Regulatory Flexibility Act of 1980, Proposed Rule (50 FR 20913; May 21, 1985).

¹² NRC Size Standard for Making Determinations Required by the Regulatory Flexibility Act of 1980 (50 FR 50241; December 9, 1985).

¹³ Pub. L. 101-508.

¹⁴ Revision of Fee Schedules; 100% Fee Recovery, Final Rule (56 FR 31507; July 10, 1991). The 100 percent fee recovery was less the amount appropriated from the U.S. Department of Energy administered Nuclear Waste Fund for FYs 1991 through 1995.

¹⁵ *Id.*

¹⁶ Limited Revision of Fee Schedules, Final Rule (57 FR 13625; April 17, 1992).

¹⁷ NRC Size Standards; Revision, Final Rule (60 FR 18344; April 11, 1995).

¹⁸ 13 CFR 121.102(c).

Most recently, on December 5, 2019, the SBA published a final rule modifying its method for calculating average annual receipts used to prescribe size standards for small businesses. Specifically, in accordance with the Runway Act, which amended the Small Business Act,¹⁹ the SBA amended its regulations on the calculation of average annual receipts for all of the SBA's receipts-based size standards and, for other agencies' proposed receipts-based size standards, from a 3-year averaging period to a 5-year averaging period. An agency without separate statutory authority to issue size standards must satisfy certain requirements to prescribe a size standard.²⁰ First, the agency must offer an opportunity for public notice and comment on the proposed size standard. Second, the proposed size standard must, as pertaining to the receipts-based size standards, "provide for determining the size of a business concern providing services on the basis of annual average gross-receipts of the business concern over a period of not less than 5 years."²¹ Since the NRC does not have separate statutory authority to issue size standards, the agency must offer an opportunity for public notice and comment on any proposed changes to its size standards. In addition, the NRC must change its proposed receipts-based size standards from a 3-year averaging period to a 5-year averaging period to comply with the Runway Act and the SBA's regulations. Finally, the NRC must obtain approval of the proposed size standard from the SBA Administrator.

FY 2020 Small Entity Survey Results and Analysis

In FY 2020, the NRC surveyed its materials licensees, which currently include approximately 2,500 diverse materials licensees, to help determine whether the NRC should change the agency size standards in 10 CFR 2.810.²² Even though 10 CFR Part 72 licensees are eligible to qualify as small entities, 100 percent of the licensees that currently qualify as small entities are in the materials users fee class. The NRC announced the voluntary survey in the *Federal Register* on February 4, 2020, with an extended due date of April 30, 2020, in order to achieve a higher response rate.²³ The staff also posted the survey on the NRC's public Web site for stakeholders to respond electronically and mailed all materials licensees a paper survey with a return envelope.

The staff analyzed the survey results and reviewed the revised standards set by the SBA to determine whether a change to the size standards is warranted. Of the 724 responses (29 percent of the approximately 2,500 licensees surveyed) received, the majority of the survey

¹⁹ 15 U.S.C. § 632, et seq.

²⁰ 13 CFR 121.903

²¹ In 13 CFR 121.105, "How does SBA define 'business concern or concern'?", the SBA defines "business concern or concern" as follows:

(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

(b) A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

(c) A firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size.

²² In order to survey the public, the NRC obtained a clearance (in accordance with the Paperwork Reduction Act) from the Office of Management and Budget on November 8, 2019, to allow the staff to proceed with a voluntary survey of materials licensees.

²³ Survey of NRC's Materials Licensees (85 FR 6225; February 4, 2020).

responses (551 responses or approximately 76 percent) were from materials licensees not engaged in manufacturing. Of these 551 responses from licensees not engaged in manufacturing, 83 percent (459 responses) were from materials licensees in two primary fee categories: 3P, "All Other Specific Byproduct Material Licensees," and 7C, "Medical Other." Based on the NRC's current size standards and the data provided in response to the survey, approximately 50 percent (276 respondents) that identified as a small business not engaged in manufacturing would appear to qualify as small entities and thus be eligible for a reduced annual fee. In addition, approximately 41 percent (229 responses) would not appear to qualify based on average gross-receipts over \$7.0 million, which exceeds the current NRC size standards based on gross-receipts for small entity status. Finally, approximately 9 percent of the respondents (46 respondents) did not provide or did not know their gross-receipts tier in order for the staff to determine whether they would appear to qualify as small entities. Of the remaining 173 responses (approximately 24 percent), 96 responses were from materials licensees that are manufacturing, 67 responses were from small governmental licensees, and 10 responses were from small not-for-profit organizations.

In addition, the staff also considered whether it is now possible to use NAICS codes associated with the SBA's size standards to replace the NRC's industry-specific small entity size standards. Based on the 724 survey responses, 49 percent (355 respondents) did not know their NAICS code(s). Another 51 percent (369 of respondents) stated that they knew their NAICS code(s) and provided a total of 121 unique primary NAICS codes. The staff reviewed each NAICS code provided by the respondents and compared the data to SBA's "Table of Small Business Size Standards Matched to North American Industry Classification System Codes," updated on August 19, 2019.²⁴ Of the 369 respondents that provided NAICS codes, 32 respondents provided NAICS codes that the staff could not confirm as valid based on the SBA's size standards table; therefore, after removing these respondents, only 47 percent (337 respondents) identified apparently valid NAICS codes. However, despite verifying the validity of the primary NAICS codes based on the SBA's table, the staff was unable to confirm that each licensee provided the correct applicable NAICS code. Given that 49 percent of the materials licensees did not know their primary NAICS code, it is apparent that the level of burden for licensees to complete the annual self-certification in a timely manner would increase if the NRC implemented the use of NAICS codes for the small entity certification. Based on the current NRC size standards pursuant to 10 CFR 2.810, and the use of the upper and lower tiers under 10 CFR 171.16(c), licensees can easily apply the current structure of the NRC's size standards to qualify for reduced annual fees. As a result of the survey results and these considerations, instead of using NAICS codes associated with size standards, the staff determined that it remains appropriate for the agency to retain separate size standards that are more consistent with the NRC's regulatory activities. With the exception of inflation-related increases and adjusting the methodology for consistency with SBA regulations, the survey did not suggest that the NRC should change its small entity size standard.

To summarize, the results of the survey determined that NRC should not use NAICS codes for the purpose of size standards for the following four reasons:

- (1) Use of NAICS codes would result in confusion and place an additional burden on licensees trying to qualify as small businesses since almost half of the survey respondents did not know their NAICS code.

²⁴ <https://www.sba.gov/document/support--table-size-standards>.

- (2) The historical reasons for not using the NAICS codes continue to be valid. The NAICS codes were originally designed and developed to collect economic data and were eventually used to qualify business entities for government contracting programs. NAICS codes were not designed for the assessment of annual fees. It continues to be the case that the staff can more readily validate information for assessing fees using specific standards that are consistent with the NRC's regulatory activities rather than using the NAICS codes that are intended for a different purpose.
- (3) A small entity could have multiple applicable NAICS codes or provide invalid or incorrect NAICS codes, which could result in an error in reporting and assessing annual fees.
- (4) The NRC tiers are easy to understand, and licensees can easily apply the criteria.

DISCUSSION:

Title

"Receipts-Based NRC Size Standards"

Regulations

This proposed rulemaking would affect 10 CFR 2.810 and 10 CFR 171.16(c).

Regulatory Issue

The NRC's regulations in 10 CFR 2.810 and 171.16(c) contain the criteria that materials licensees and licensees under 10 CFR Part 72, "Licensing requirements for the independent storage of spent nuclear fuel and high-level radioactive waste, and reactor-related greater than Class C waste," use to qualify as small entities. These small entities would be eligible for a reduced upper or lower tier annual fee. The last revision to the receipts-based size standards in 10 CFR 2.810 and 10 CFR 171.16(c) was in FY 2012 and FY 2013, respectively, to account for inflation. In addition, the SBA's final rule published on December 5, 2019, modified the method for calculating average annual receipts used to prescribe size standards for small businesses. Specifically, in accordance with the Runway Act, the SBA changed its regulations on the calculation of average annual receipts for all of the SBA's receipts-based size standards, and for other agencies' proposed receipts-based size standards, from a 3-year averaging period to a 5-year averaging period. For consistency, the staff would amend the gross-receipts size standards in 10 CFR 2.810 and the tiers in 10 CFR 171.16(c) for inflation adjustments and will modify the average gross-receipts for small businesses not engaged in manufacturing from a 3-year averaging period to a 5-year averaging period to conform to the SBA's regulations, as amended in response to the Runway Act.

Existing Regulatory Framework

The NRC's current nuclear industry-specific size standards are provided in 10 CFR 2.810. The NRC's current size standards under 10 CFR 2.810 require a small, nonmanufacturing, for-profit business to provide its average gross-receipts over the business's last 3 completed fiscal years. Under 10 CFR 171.16(c), the NRC has established two tiers (upper and lower) of fees for licensees that qualify as small entities under the NRC's size standards. The upper tier receipts-based size standard is \$485,000 to \$7.0 million, and the lower tier is less than \$485,000.

Pursuant to 10 CFR 171.16(c), a licensee that is required to pay an annual fee may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification along with its annual fee payment, the licensee may pay reduced annual fees. As part of the certification process, a licensee that meets the NRC's size standards for a small entity must complete NRC Form 526, "Certification of Small Entity Status for the Purposes of Annual Fees," certifying that it meets the NRC's size standards for a small entity.

Explanation of Why Rulemaking is the Preferred Solution

For the NRC's size standards, there are no alternatives to rulemaking to amend the methodology for calculating average gross-receipts and the upper and lower tier receipts-based size standards to reflect inflation adjustments. Since the NRC has not amended receipts-based size standards in 10 CFR 2.810 and the tiers in 10 CFR 171.16(c) since FY 2012 and FY 2013, respectively, inflation adjustments to the gross-receipts tiers are warranted. The proposed rulemaking would amend 10 CFR 2.810 and 10 CFR 171.16(c) to reflect two changes: inflation adjustments, which are consistent with the adjustments made by the SBA, and methodology changes for calculating average gross-receipts as required by SBA regulations, as amended in response to the Runway Act.

Specifically, the staff would amend 10 CFR 2.810 and 10 CFR 171.16(c) to increase the NRC's upper tier receipts-based size standard from \$7.0 million to \$8.0 million for small businesses and small not-for-profit organizations, in order to conform to the SBA's size standard for nonmanufacturing. In addition, the proposed rulemaking would amend 10 CFR 171.16(c) to increase the lower tier receipts-based size standard from \$485,000 to \$555,000, based upon the percent change in the upper tier. By increasing the receipts-based size standards in 10 CFR 2.810 and 10 CFR 171.16(c), this rulemaking would result in additional licensees qualifying as small entities.

In addition, the NRC will amend the average gross-receipts from a 3-year averaging period to a 5-year averaging period as required by SBA's regulations in 13 CFR 121.903, as amended in response to the Runway Act. Pursuant to the Small Business Act, as amended, and because the NRC does not have separate statutory authority to issue size standards, the agency must issue any proposed changes to its size standards for public notice and comment. Furthermore, the NRC must obtain approval from the SBA Administrator before issuing proposed and final rules.

Description of Rulemaking: Scope

The proposed rulemaking would amend 10 CFR 2.810 and 10 CFR 171.16(c) to reflect inflation adjustments, which are consistent with the adjustments made by the SBA and will amend the methodology for calculating average gross-receipts as required by SBA's regulations, as amended in response to the Runway Act. Specifically, the staff would amend 10 CFR 2.810 and 10 CFR 171.16(c) to increase the NRC's upper tier receipts-based size standard from \$7.0 million to \$8.0 million for small businesses and small not-for-profit organizations, in order to remain consistent with the inflation adjustments made in the SBA's size standard for nonmanufacturing. In addition, the proposed rulemaking would amend 10 CFR 171.16(c) to increase the lower tier receipts-based size standard from \$485,000 to \$555,000, based upon the percentage change in the upper tier.

Further, the staff will amend the average gross-receipts calculation process to change from a 3-year averaging period to a 5-year averaging period, as required by SBA regulations, as

amended in response to the Runway Act. The staff would adopt a transition period of 2 years, during which time licensees may choose to use a 3-year averaging period or a 5-year averaging period. This transition period will mitigate the impact on a licensee who, because of declining annual revenues, may lose status as a small business or very small business when averaging over 5 years instead of 3 years.

Pursuant to the Small Business Act, as amended, because the NRC does not have separate statutory authority to issue size standards, the NRC must obtain approval for the proposed and final rules from the SBA Administrator. In addition, the staff would issue the proposed rule with the proposed amendments for a 30-day public notice and comment period.

To ensure that the size standards are consistently updated to account for inflation, the staff would revisit the size standards every 5 years. This periodic review is in line with how often the SBA assesses the impact of inflation on its monetary-based size standards in 13 CFR 121.102(c). While no change is warranted at this time, the staff will also revisit the NRC's employee-based and population-based size standards when the SBA amends its employee-based or population-based size standards.

Preliminary Backfitting and Issue Finality Analysis

The staff expects that this rulemaking would not constitute a backfit as defined in the backfit rule (10 CFR 50.109, "Backfitting") and would not be inconsistent with any applicable issue finality provisions in 10 CFR Part 52. The proposed amendments do not require the modification of, or addition to the systems, structures, components, the design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility.

Estimated Schedule

If the Commission approves the staff's recommendation, the staff would develop a proposed rule and obtain approval from the SBA before publishing the proposed rule in the *Federal Register* for public comment. After addressing stakeholder comments, the NRC would submit the final rule to the Commission and to the SBA for approval. The final rule would be effective 30 days after publication in the *Federal Register*. The staff estimates the following time frame for this rulemaking:

- publication of proposed rule—July 2021
- publication of final rule—January 2022
- effective date—February 2022 (30 days after publication of the final rule)

Preliminary Priority

Based on the Common Prioritization of Rulemaking methodology (Agencywide Documents Access and Management System (ADAMS) Accession No. ML18263A070), the preliminary priority for this rulemaking activity is medium, with a score of 17 points (0, 4, 8, 5). The staff has established this preliminary priority based on the NRC's 2018–2022 Strategic Plan (ADAMS Accession No. ML18032A561), for the following reasons:

- Factor A: NRC Strategic Plan (strategic goals). This rulemaking does not contribute toward the safety or security goals.

- Factor B: NRC Strategic Plan (principles of good regulation). This rulemaking activity is a moderate contributor toward multiple strategies (openness, clarity, and reliability).
- Factor C: Government priority. This rulemaking activity is a significant contributor toward one or more considerations. It conforms regulations with the Small Business Regulatory Enforcement Fairness Act, the RFA, and the SBA's receipts-based size standards.
- Factor D: Public priority. This rulemaking activity is a significant contributor toward one or more considerations. The proposed amendments to increase the receipts-based size standards under 10 CFR 2.810 and the tiers under 10 CFR 171.16(c) would enable additional licensees to be eligible to qualify as small entities and thus pay a reduced annual fee.

The priority for a rulemaking activity can change over time. A common reason for a change in priority are changes in the rulemaking's scope as it goes through the rulemaking process.

Description of Rulemaking: Estimate of Resources

The proposed action is estimated to involve a low magnitude of costs and use existing resources to coordinate with the SBA to obtain approval to publish proposed and final rules to update the NRC's gross-receipts size standards under 10 CFR 2.810 and the tiers in 10 CFR 171.16(c) to conform to the SBA's inflation adjustments and to change to a 5-year averaging formula for calculating gross-receipts of small businesses under 10 CFR 2.810.

The proposed action is estimated to provide the following benefits and costs:

- **Benefits:**
 - This action would result in continued compliance with the RFA, since this rulemaking would reduce the impact of annual fees on small entities by increasing the receipts-based size standards in 10 CFR 2.810 and the tiers in 10 CFR 171.16(c) that licensees use to qualify as small entities.
 - While it is not certain how many licensees would qualify as small entities under a receipts-based size standards that is adjusted for inflation, the staff estimates that 95 additional licensees (a 12-percent increase) would qualify as small entities and be eligible to pay a reduced annual fee.²⁵
 - The licensees can have increased regulatory confidence that the NRC has amended the agency's receipts-based size standards to be consistent with the SBA's practices, and that staff would review the current size standards and determine whether proposed amendments are needed every 5 years or sooner based on the SBA's adjustments.

²⁵ In FY 2012, 876 materials licensees qualified as small entities. In FY 2013, the year after the NRC increased the receipts-based size standards in 10 CFR 2.810, 983 materials licensees qualified as small entities. This represents a 12-percent increase in the number of licensees that qualified as small entities. In FY 2020, 793 materials licensees qualified as small entities. Based on the assumption that an additional 12-percent of materials licensees would qualify as small entities, the staff assumes 95 new materials licensees would qualify as a small entity. This would result in 888 total materials licensees qualifying as small entities compared to FY 2020 (793 + 95 = 888).

- Costs:
 - The significance of changing the average gross-receipts from a 3-year averaging period to a 5-year averaging period is not yet clear, as the average gross-receipts have been based on a 3-year averaging period since the NRC established its size standards in 1985. Every licensee would likely need to expend some effort to reevaluate its gross-receipts and may need to provide additional information if questions arise during the staff's certification review. Modifying to a 5-year averaging period of gross-receipts may result in a negative impact in that some licensees that are close to the upper limit of their size standard could lose their small entity status, while others may newly qualify as small entities.²⁶ Despite this cost, the NRC is statutorily required pursuant to the Runway Act to amend the average gross-receipts from a 3-year averaging period to a 5-year averaging period.
 - The expected increase in additional licensees qualifying as small entities could possibly increase the NRC's net budget authority as a result of additional licensees qualifying as small entities.²⁷

Cumulative Effects of Regulation

The proposed amendments to 10 CFR 2.810 and 10 CFR 171.16(c) would not add regulatory burden for the NRC's licensees. The proposed revisions would amend the receipts-based size standards to account for inflation adjustments and will change the average gross-receipts from a 3-year averaging period to a 5-year averaging period. The staff would provide an update on this rule in the FY 2021 and FY 2022 fee rules to ensure that affected licensees would be adequately informed.

Agreement State Considerations

The NRC does not assess fees for Agreement State licensees. Some Agreement States may use the NRC's fee structure, including similar size standards for licensees in order to qualify for a reduced annual fee, in the assessment of fees for their licensees. As part of the annual fee process, the staff notifies the Agreement States of the changes being implemented in the fee rule. As part of this rulemaking, if approved, the staff would also notify the Agreement States during the proposed and final rules stages of any changes.

²⁶ The SBA acknowledged that moving to a 5-year averaging period could cause some small businesses that are close to the upper limit of their size standard to lose their small business status immediately or subsequently during a period of declining revenues. A firm that exceeds the size standard based on a 5-year average but then has subsequent years of declining revenues will face a longer period before regaining small business status. To mitigate the impact, the SBA is providing a transition period until January 6, 2022. During this time, firms can choose to average either their 3-year receipts or their 5-year receipts for size eligibility purposes (84 FR 66565; December 5, 2019).

²⁷ Historically, the costs not recovered from small entities under 10 CFR 171.16(c) have been included as part of the 10 percent in fee relief under the OBRA-90. Effective October 1, 2020, the Nuclear Energy Innovation and Modernization Act (NEIMA) (Pub. L. 115-439) repeals Section 6101 of OBRA-90 and puts in place a revised fee recovery framework, requiring the NRC to recover, to the maximum extent practicable, approximately 100 percent of its total budget authority, less excluded activities. In FY 2021, costs not recovered from small entities under 10 CFR 171.16(c) are considered an excluded activity and are included as part of the NRC's budget authority.

Guidance

The NRC would not need to update or create any guidance documents in parallel with the rulemaking. However, the NRC annually publishes a Small Entity Compliance Guide in conjunction with the annual fee rule, and the staff will update this guide at that time.

Advisory Committee on Reactor Safeguards Review

Because the proposed amendments would only amend the receipts-based size standards that affect the ability of licensees to qualify as small entities for a reduced annual fee, the rulemaking is outside the scope of the Advisory Committee on Reactor Safeguards charter, and review by the Committee is not necessary.

Committee to Review Generic Requirements

The staff recommends that review by the Committee to Review Generic Requirements is not necessary because the staff expects that no backfitting would be associated with this rulemaking action, as described in the “Description of Rulemaking: Preliminary Backfitting and Issue Finality Analysis” section of this rulemaking plan.

Advisory Committee on the Medical Use of Isotopes

The staff has determined that it is not necessary for the Advisory Committee on the Medical Use of Isotopes (ACMUI) to review this rulemaking. This rulemaking would not result in any policy or technical issues related to the medical uses of radioactive material that would require ACMUI review. This rulemaking does not alter how radioactive materials are used. It makes an inflation-based adjustment to the NRC’s gross-receipts size standard that licensees use to certify as small entities to qualify for reduced annual fees, and changes the averaging period used to calculate annual average receipts for the receipts-based NRC size standard for small businesses not engaged in manufacturing, from 3 years to 5 years.

Analysis of Legal Matters

The Office of the General Counsel has reviewed this rulemaking plan and has not identified any issues necessitating a separate legal analysis at this time.

COMMITMENT:

If the Commission approves this rulemaking plan, the staff would proceed in accordance with SECY-16-0042, “Recommended Improvements for Rulemaking Tracking and Reporting,” dated April 4, 2016 (ADAMS Accession No. ML16075A070). The staff would update the rulemaking activity in the agency’s rulemaking tracking tool. The staff would retitle the existing docket number, NRC-2014-0264, “Receipts-Based Small Business Size Standards,”²⁸ to “Receipts-Based NRC Size Standards” to reflect the broader scope of the rulemaking since this proposed rulemaking would adjust two receipts-based NRC size standards (i.e., for small businesses and not-for-profit organizations).

²⁸ This rulemaking docket was established before the revision to policy and procedures on initiating rulemaking, including Commission involvement at early stages of rulemaking.

RECOMMENDATION:

The staff recommends retaining the NRC's nuclear industry-specific size standards; however, the agency should adjust the tiers to reflect inflation adjustments as the last inflation adjustment was in FY 2012 and FY 2013. The staff believes that the current NRC size standards with lower and upper tiers are both fair and equitable. Over the past 5 years, this process has resulted in approximately 37 percent of the NRC's materials licensees qualifying as small entities paying reduced annual fees. Currently, no 10 CFR Part 72 licensees have qualified as small entities. However, because the NRC has not revised 10 CFR 2.810 since FY 2012, the staff believes an adjustment to the upper and lower tiers for gross-receipts is warranted based on inflation. As part of the recommended update, the staff would amend 10 CFR 2.810 and 10 CFR 171.16(c) to increase the NRC's upper tier receipts-based small business size standard from \$7.0 million to \$8.0 million for small businesses and small not-for-profit organizations in order to remain consistent with the inflation adjustments made to the SBA's size standard for nonmanufacturing concerns. This represents a 14.3-percent increase in the small business size standard.

In addition, as part of this recommendation, the staff would amend 10 CFR 171.16(c) to increase the lower tier receipts-based size standards from \$485,000 to \$555,000, based upon the percent change in the upper tier. These amendments would remain consistent with the inflation adjustments made to the SBA's receipts-based small business size standard, which is the most commonly used SBA standard for nonmanufacturing industries.

Finally, to be consistent with SBA regulations, as amended in response to the Runway Act, the staff will change its regulations on the calculation of the receipts-based NRC size standards from a 3-year averaging period to a 5-year averaging period for small businesses not engaged in manufacturing. The staff would adopt a transition period of 2 years, during which time licensees may choose to use a 3-year averaging period or a 5-year averaging period. Because the NRC is required to amend the average gross-receipts from a 3-year averaging period to a 5-year averaging period, the staff will still proceed with changing the averaging period even if significant comments objecting to the transition period are received.

To ensure that the size standards are consistently updated to account for inflation the staff would revisit the size standards every 5 years, or as the SBA makes amendments to account for inflation. The staff will also revisit the NRC's employee-based and population-based size standards when the SBA amends its employee-based or population-based size standards.

The Chief Financial Officer (CFO) does not have delegated authority to amend the NRC's size standards in 10 CFR 2.810. In addition, Management Directive 6.3, "The Rulemaking Process," provides that rulemakings delegated to the Executive Director for Operations (EDO) and modifying 10 CFR Part 2 must obtain a no legal objection from the Office of General Counsel (OGC) and the concurrence of the Office of Commission Appellate Adjudication (OCAA) and the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP). As a result, OGC has consulted with the OCAA and ASLBP, and the three offices agree that formal concurrence from OCAA and ASLBP on periodic rulemakings to amend the NRC's size standards in 10 CFR 2.810 is unnecessary because these rulemakings would involve no issues of policy and would not change the agency's rules of adjudicatory practice and procedure. Accordingly, if the Commission approves the initiation of rulemaking to update the NRC's gross-receipts size standard, the staff requests that the Commission approve a permanent delegation of authority to the CFO to initiate and sign rules amending the NRC size standards to incorporate the proposed and future regulatory amendments to 10 CFR 2.810. This delegation

would include making changes to update the receipts-based size standards for inflation as reflected by the SBA or other appropriate measure.²⁹

RESOURCES:

The enclosure estimates the resources needed to complete this rulemaking.

COORDINATION:

The Office of the General Counsel has no legal objection to this action. The Office of the Chief Financial Officer has reviewed this paper and has no concerns with the estimated resources in the enclosure.

Cherish K.
Johnson

Digitally signed by Cherish K.
Johnson
Date: 2020.12.07 17:22:35
-05'00'

Cherish K. Johnson
Chief Financial Officer

Enclosure:
Rulemaking Estimated Resources

²⁹ This update would include any changes made by the SBA during the development and issuance of the proposed and final rule.

SUBJECT: RULEMAKING PLAN TO AMEND THE RECEIPTS-BASED NRC SIZE STANDARDS (NRC-2014-0264), Dated December 7, 2020

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**ADAMS ACCESSION NO: ML20268B326 (package); ML20268B327 (memorandum)
ML20268B341 (enclosure)**

*with edits

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