

this or any other part of Title 13. For example, persons debarred under the SBA or Government-wide debarment regulations may not conduct business with SBA. SBA may request that any agent supply written evidence of his or her authority to act on behalf of an applicant, participant, or lender as a condition of revealing any information about the applicant's, participant's, or lender's current or prior dealings with SBA.

§ 103.3 May SBA suspend or revoke an agent's privilege?

The Administrator of SBA or designee may, for good cause, suspend or revoke the privilege of any agent to conduct business with SBA. Part 134 of this chapter states the procedures for appealing the decision to suspend or revoke the privilege. The suspension or revocation remains in effect during the pendency of any administrative proceedings under Part 134 of this chapter.

§ 103.4 What is "good cause" for suspension or revocation?

Any unlawful or unethical activity is good cause for suspension or revocation of the privilege to conduct business. This includes:

- (a) Attempting to influence any employee of SBA or a lender, by gifts, bribes or other unlawful or unethical activity, with respect to any matter involving SBA assistance.
- (b) Soliciting for the provision of services to an applicant by another entity when there is an undisclosed business relationship between the two parties.
- (c) Violating ethical guidelines which govern the profession or business of the agent or which are published at any time by SBA.
- (d) Implying or stating that the work to be performed for an applicant will include use of political or other special influence with SBA. Examples include indicating that the entity is affiliated with or paid, endorsed or employed by SBA, and advertising using the words *Small Business Administration* or *SBA* or its seal or symbol, and giving a "guaranty" to an applicant that the application will be approved.
- (e) Charging or proposing to charge any fee that does not bear a necessary and reasonable relationship to the services actually rendered or expenses actually incurred in connection with a matter before SBA or which is materially inconsistent with the provisions of an applicable compensation agreement or lender service provider agreement. A fee based solely on a percentage of a loan or

guarantee amount can be reasonable, depending on the circumstances of a case and the services actually rendered.

(f) Engaging in any conduct indicating a lack of business integrity or business honesty, including debarment, criminal conviction, or civil judgment within the last seven years for fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, receiving stolen property, false claims, or obstruction of justice.

(g) Acting as both a lender service provider and a packager for an applicant on the same SBA business loan. A limited exception to this "two master" prohibition exists in the following circumstances:

(1) The lender service provider: is asked by the lender to perform packaging services on a loan, will be compensated solely by the lender, and provides a written disclosure to the applicant; or

(2) The packager: is first asked to package the loan by the lender, and is first asked to package the loan only after the lender has decided to make the loan and the terms of the loan have been established.

(h) Violating materially the terms of any compensation agreement or lender service provider agreement provided for in section 103.5.

(i) Violating or assisting in the violation of any SBA regulations, policies, or procedures of which the applicant has been made aware.

§ 103.5 How does SBA regulate an agent's fees and provision of service?

(a) Any applicant, agent, packager, or lender service provider must execute and provide to SBA a compensation agreement or lender service provider agreement governing the compensation charged for services rendered or to be rendered to the applicant or lender in any matter involving SBA assistance. SBA provides the form of compensation agreement and a suggested form of lender service provider agreement to be used by agents.

(b) Compensation agreements must provide that in cases where SBA deems the compensation unreasonable, the agent, packager or lender service provider must: reduce the charge to an amount SBA deems reasonable, refund any sum in excess of the amount SBA deems reasonable to the applicant, and refrain from charging or collecting, directly or indirectly, from the applicant an amount in excess of the amount SBA deems reasonable.

(c) Each lender service provider must enter into a written agreement with each lender for whom it acts in that capacity.

SBA will review all such agreements. Such agreements need not contain each and every provision found in the SBA's suggested form of agreement. However, each agreement must indicate that both parties agree not to engage in any sharing of secondary market premiums, that the services to be provided are accurately described, and that the agreement is otherwise consistent with SBA requirements. Subject to the prohibition on splitting premiums, lenders have reasonable discretion in setting compensation for lender service providers. Such compensation will generally be considered reasonable unless:

(1) The compensation is clearly excessive in light of industry standards and the services to be performed; and

(2) The excess compensation is adversely affecting the loan terms provided to applicants.

Dated: November 13, 1995.

Philip Lader,

Administrator.

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13 CFR Part 121

Small Business Size Regulations

AGENCY: Small Business Administration.

ACTION: Proposed rule.

SUMMARY: In response to President Clinton's government-wide regulatory reform initiative, the Small Business Administration (SBA) has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. This proposed rule would improve the Agency's size program by simplifying and clarifying language in the existing rules, conforming these rules to present SBA policies and practices, and providing some substantive modifications to streamline the delivery of services to the public. The revised regulations would be more understandable and much easier to use. The proposed rule would reduce the number of sections. It would make the definition of "affiliation" more concise. While no longer recognizing an absolute right to appeal size determinations, it would give the Office of Hearings and Appeals (OHA) discretionary authority to accept size appeals. The proposed rule would improve language, but would not change the existing size standards which apply to particular industries.

DATES: Comments must be submitted on or before December 26, 1995.

ADDRESSES: Written comments should be addressed to David R. Kohler, Regulatory Reform Initiative Team Leader, Attention: Part 121, Office of General Counsel, Small Business Administration, 409 3rd Street, S.W., Suite 13, Washington, D.C. 20416.

FOR FURTHER INFORMATION CONTACT: John W. Klein, Chief Counsel for Special Programs, Office of General Counsel, at (202) 205-6645.

SUPPLEMENTARY INFORMATION: On March 4, 1995, President Clinton issued a Memorandum to federal agencies, directing them to simplify their regulations. In response to this directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. This proposed rule would amend SBA's regulations governing its size program which was authorized to be established by sections 3(a) and 5(b)(6) of the Small Business Act, 15 U.S.C. 632(a), 634(b)(6). It is designed to streamline the size standards operation by simplifying and clarifying existing regulatory language and by eliminating unnecessary, irrelevant, or obsolete provisions. SBA examined the purpose of each section of the existing regulation in developing this proposal. Where appropriate, it eliminated, consolidated, or rewrote sections for ease of use and clarity. The proposed unnumbered substantive category headings would be: Provisions of General Applicability, Size Standards Used to Define Small Business Concerns, Size Eligibility Requirements for SBA Financial Assistance, Size Eligibility Requirements for Government Procurement, Size Eligibility Requirements for Sales or Lease of Government Property, Size Eligibility for the Minority Enterprise Development (MED) Program, Size Eligibility Requirements for the Small Business Innovation and Research (SBIR) Program, Size Eligibility Requirements for Paying Reduced Patent Fees, Size Eligibility Requirements for Compliance with Programs of Other Agencies, Procedures for Size Protests and Requests for Formal Size Determinations, Appeals of Size Determinations and SIC Code Designations, Eligibility of Organizations for the Handicapped for Small Business Set-asides, and Waivers of the Nonmanufacturer Rule. The proposed rule would amend office titles to reflect a previous reorganization of functions within the structure of SBA.

SBA has attempted to rewrite Part 121 in plain English in order to make the regulations more readable and less

confusing. SBA has identified the following eight significant changes proposed by this rule.

Refine the definition of "affiliation." The proposed rule at § 121.103(a) would make the definition of "affiliation" more concise. The intent in revising the provisions pertaining to affiliation is to make the definition easier to understand.

Additional exclusions from "affiliation" coverage. Four additional exclusions from "affiliation" coverage are proposed in § 121.103(a)(2): (1) small businesses that are members of approved pools for a joint program of research and development, (2) concerns that lease employees from a concern whose principal business is leasing employees to other businesses, (3) mentor/protege firms participating in Federal Mentor-Protege programs, and (4) for purposes of eligibility for the Small Business Investment (SBIC) program only, certain investors in SBIC portfolio concerns, provided the investors do not control the concern other than to the extent that would be permitted for SBICs under the SBIC regulations (currently, § 107.801 of this title; in the revised SBIC regulations at § 107.865).

Revision of "annual receipts" definition. This definition would be simplified by incorporating figures already contained on a concern's Federal Income Tax return for purposes of calculating a concern's average annual receipts. In addition, amounts collected for another by a conference management services provider or an advertising agent would be excluded from a concern's annual receipts, similar to that of a travel agent.

Grant OHA discretionary authority to hear size determination appeals.

Contracting officers for procuring agencies have cited unwelcome delays in the procurement process when small business size determinations are appealed to the Office of Hearings and Appeals (OHA). Under existing SBA regulatory guidelines, a party which is adversely affected by a size determination has the right to appeal the determination to OHA. However, Federal Acquisition Regulations (48 C.F.R. 19.302) provide that a contracting officer is not required to suspend award after a size determination is made even if the determination is appealed to OHA, and further provide that the OHA decision applies to a pending acquisition only if the decision is received before award. Therefore, if the OHA decision is to have relevance, it must be rendered prior to award. In an effort to streamline consideration of size determinations and bring more speed to

the decision-making process, proposed § 121.1101 would eliminate appeals to OHA as a matter of right and instead give OHA discretion to review such appeals. A size determination rendered by an authorized Agency official would be considered final unless OHA agreed to review the determination. This would give OHA the latitude to consider those cases which have precedential value or which might involve clear error of fact or law. Procedures for requesting discretionary review of size determinations would be set forth in part 134.

Change the time when size is determined for MED application purposes. Under the present regulations, an applicant to SBA's MED program is small if, at the time of its application, it is small under the size standard for its primary industry. The proposed regulation would change the time for determining the applicant's size to the time when SBA issues its eligibility determination. Thus, under the proposed regulation, a concern which was small when it applied but which became large during SBA's consideration of its application would not be permitted to enter the program. SBA does not believe that it should admit a concern to the MED program knowing that it is no longer small in its primary business. The concern could no longer obtain 8(a) or small business set-aside contracts in its primary industry, and the concern could be perceived to be other than disadvantaged because of that success. In addition, if that were the only business that the concern was in, SBA would be put in the awkward position of admitting the concern to the program one day, but initiating termination proceedings from the program the next.

Use of size standards for programs of other agencies. This proposed rule sets forth the limited circumstances under which the Secretary of a department or the head of a Federal agency may prescribe, for the use of such department or agency, a size standard other than one which has been established by SBA.

Individual waivers of the "Nonmanufacturer Rule." The proposed rule establishes procedures for granting waivers of the Nonmanufacturer Rule for individual products on specific solicitations. Procedures for granting individual waivers would be combined with provisions pertaining to class waivers.

Other changes to Part 121. This proposed rule would also make changes in the size eligibility requirements which are identified below in the section-by-section analysis. Several

typographical errors or inadvertent omissions would be corrected, and several obsolete or irrelevant references would be eliminated. The proposed rule would not make any changes in actual size standards applicable to specific industries.

Section-by-Section Analysis

The following is a section by section analysis of each provision of SBA's regulations that would be affected by this proposed rule:

The current § 121.101 is a policy statement reciting Congressional intent as set forth in the Small Business Act. SBA proposes to revise § 121.101 to state succinctly the purpose of small business size standards.

Section 121.102 would be deleted and the substance of the provision moved to the revised § 121.101.

Present § 121.201 would be deleted and the substance of subsection (a) consolidated with proposed § 121.101. Present subsection (b) is a philosophical statement relating to Federal assistance in general and would be eliminated as unnecessary. The general outline of SBA's size program, contained in § 121.202, would be deleted as unnecessary since revised § 121.101 would provide general guidance as to the purpose of size standards and how SBA establishes them. Revised § 121.201 would detail specific size standards, and revised §§ 121.301 through 121.903 would describe the relationship of size standards for specific types of Federal assistance. Procedures for size protests and requests for size determinations would be found in proposed § 121.1001. Appeals of size determinations and SIC code designations would be covered in proposed § 121.1100.

Section 121.102 would be amended to explain, in summary fashion, how SBA develops or revises an industry size standard. Two criteria for size standards have gained general acceptance since SBA's inception and are the most widely used definitions of small business. The first is the 500 employee size standard, which is the most common size standard among the manufacturing and mining industries. Instituted by the Smaller War Plants Administration and adopted with the formation of SBA, it applies to a majority of these industries. The second is the average annual receipts standard, which applies to most retail and service industries and also dates back to the inception of SBA. In 1953, a limit of \$1.0 million in average annual receipts was applied to many of these industries. Over time, inflation and industry changes have increased that original

level to \$5 million. Size standards for particular industries deviate from these "anchor standards" depending on the structural characteristics of the industry and other factors described in SBA's rulemaking actions as important influences on an industry's structure. Proposed § 121.102 would identify the factors SBA considers in setting any size standard, including degree of competition in an industry, average firm size in the industry, start-up costs and entry barriers in the industry, and distribution of firms by size in the industry.

Section 121.203 would be deleted and the substance of the provision would be contained in revised § 121.1006(h)(3).

Section 121.204 would be deleted.

The substance of the provision would be incorporated in revised §§ 121.1006(h)(3) and 121.1007.

Section 121.205 would be eliminated as unnecessary.

The subject of §§ 121.301(a) and 121.301(b) would be transferred to § 121.102(b), with the provision amended for relevance. Section 121.301(c) would be deleted as unnecessary since proposed § 121.201 would contain a statement that the general size standard for all industries not listed in the table in § 121.201 would be \$5 million.

Sections 121.302 and 121.304 would be eliminated as unnecessary. The roles of the Office of General Counsel and OHA are described in Part 101 of SBA's regulations. Section 121.303 would be deleted, but the address of the Size Policy Board would be contained in the revised § 121.102(c).

Section 121.305 would be eliminated. SBA has materially changed the role of its regional offices, transferring to other SBA offices many of the functions formerly performed by regional offices. The descriptions of responsibilities with respect to size determinations and SIC code designations would be transferred to revised §§ 121.402 and 121.1002.

Definitions of terms, presently found in §§ 121.401 through 407, would be transferred to a new § 121.103. Changes in some definitions are proposed.

The definition of affiliation in current § 121.401 would be transferred to § 121.103(a) and revised for clarity. Subsection (a)(1) would be redesignated as § 121.103(a)(1)(iii). Subsections 121.401(a)(2)(i) and (ii) would be redesignated as subsection 121.103(a)(1)(i)(A) and (B). Provisions addressing "identity of interest" now found in §§ 401(a)(2)(iii) and 401(d) would be transferred to the policy statement contained in proposed § 121.103(a)(1)(i)(C). The term is a legitimate concept in characterizing

affiliation among parties, but it is dependent on specific facts in its application and is subject to a high degree of subjectivity in much of its implementation. While simpler, the designation of a list of family relationships that would always cause an "identity of interest" would penalize a number of legitimate small concerns. Close familial relationships are at times offset by estrangement of the parties. Under the circumstances, SBA has determined that a flexible approach should be retained in the size regulations.

Section 121.401(b), pertaining to exclusions from the definition of affiliation, would be transferred to a new § 121.103(a)(2) which would list and describe seven exclusions.

In addition to the exclusion from affiliation for SBICs or Development Companies, the proposed rule would add a second exclusion, for purposes of SBIC assistance, for concerns owned by venture capital firms, pension funds, and certain charitable entities exempt from federal taxation under § 501(c) of the Internal Revenue Code. Like SBICs, these entities often make financial investments in small companies when they receive ownership positions which can be held for subsequent resale. The same control limitations imposed by SBA on SBICs would be imposed on the investors covered by this affiliation exclusion.

The exclusion for business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act, or Native Hawaiian Organizations would be clarified so that affiliation would not be found solely by reason of such ownership, but still could be found where other grounds (e.g., common management) exist.

The exclusion for businesses owned or controlled by Community Development Corporations was added to SBA regulations on June 7, 1995, and would be retained with only minor editorial adjustments.

The proposed rule would add an exclusion for small businesses that are members of pools approved by the Administrator, after consultation with the Attorney General and the Chairman of the Federal Trade Commission, for a joint program of research and development. Concerns which are members of such pools would not be considered affiliated with other pool members solely by reason of their joint participation on pool approved activities. Such pools have been statutorily authorized for some time, but there has not been a corresponding

exclusion from affiliation specifically recognized in the size regulations.

The proposed rule would also add an exclusion from affiliation for concerns that lease administrative and/or other employees from a concern whose principal business is leasing employees to other businesses. The two concerns would not be considered affiliated solely by reason of the leasing agreements.

Finally, the proposed rule would add an exclusion for firms participating in Federal Mentor-Protege Programs. Although affiliation would not be found based solely on such mentor-protege relationship, affiliation could be found to exist based on other factors.

Section 121.401(c), pertaining to the nature of control, would be eliminated in the revised affiliation rule. Affiliation by stock ownership and common management would be addressed in proposed §§ 121.103(c) and (d). The non-essential elements of affiliation expressed in current subsection 401(c) would be eliminated without sacrificing clarity or definitiveness.

Section § 121.401(e), redesignated as § 121.103(c), would be clarified.

Section 121.401(f), redesignated as § 121.103(d), would clarify what constitutes an agreement in principle, and make other minor editorial changes.

Section 121.401(g) now requires SBA to determine whether a voting trust was entered into primarily for a "legitimate purpose." Since such a requirement is unnecessary and overly subjective, it would be eliminated.

The proposed rule would redesignate § 121.401(h), pertaining to common management, as § 121.103(e), and clarify that common management must control both the firm whose size status is at issue and one or more other concerns in order to constitute affiliation. It would eliminate the references to key employees, but provide that affiliation can exist where the chief executive officer, one or more general partners, or one or more members of the board of directors, control the board of directors or management of another concern.

The proposed rule would eliminate §§ 121.401(i) and (j) as separate bases for affiliation. Most firms simply sharing common facilities do not act in concert, and SBA believes that there is little likelihood of abuse if this provision is eliminated. Similarly, the "newly organized concern" basis for affiliation seldom appears alone, and its elimination as a separate basis for affiliation would not eliminate the underlying reasons for finding affiliation on other grounds.

Section 121.401(k) would be eliminated as a separate basis for

affiliation, but referenced as a factor that may cause affiliation under the totality of circumstances in proposed § 121.103(a)(2).

Affiliation through joint ventures would be moved from § 121.401(l) to § 121.103(f). The proposed rule would eliminate a specific definition of the term joint venture as unnecessary. The current regulations unintentionally define a joint venture as being formed for a single, specific contract. SBA believes it to be obvious that a joint venture may be formed to carry out more than one contract, and the regulation will be so implemented. The revision also would be reworded for brevity and clarity.

The provisions of §§ 121.401(l)(2) and (3) would be redesignated as §§ 121.103(f)(1) and (2), respectively. The provisions would be reworded for clarity, and provisions not affecting the substantive rule would be eliminated.

Section 121.401(l)(4) (proposed § 121.103(f)(3)) would be amended in two respects. It would clarify that whether a subcontractor should be considered a joint venturer depends on all circumstances pertaining to the subcontract arrangement between the parties and does not hinge solely on the percentage of subcontracted work. For example, the fact that a subcontractor is to perform a relatively large percentage of the total value of the contract might not cause SBA to consider the arrangement a joint venture where the prime contractor would be actively engaged in the performance of the contract and would exercise a supervisory role. In addition, subcontractors that supply materials may be distinguished from subcontractors that perform work. For example, a small business construction contractor would not be deemed an affiliate of a large subcontractor from which needed asphalt constituting more than 50 percent of the value of the contract was purchased where the large business was scheduled to perform no work on the contract other than the cost of the asphalt.

Section 121.401(l)(5) would be reworded for clarity and redesignated as § 121.103(f)(4).

The franchise rule in § 121.401(m) would be rewritten for clarity and redesignated as § 121.103(g).

The proposed rule would revise "annual receipts" in proposed § 121.104 (current § 121.402) to mean gross or total income plus cost of goods sold as reported on a concern's Federal income tax return. The term is meant to include revenue from the sale of products or services, interest, dividends, rents, royalties, fees, commissions, or other

income. The same allowances and proceeds collected for another concern currently subtracted from receipts would continue to be subtracted in the proposed rule. Accordingly, the size of a concern would be based upon the information shown on the Federal income tax return, as opposed to the present requirement of utilizing its regular books of account. SBA specifically requests comments on this proposed definition. Because SBA would use a concern's income tax return to determine "receipts," the concern would not be required to restate its revenue under the accrual basis of accounting if its return was filed other than under the accrual method as is presently the case.

The proposed rule would also exclude from the calculation of annual receipts amounts collected for another by conference management services firms. This action is being taken to better measure the magnitude of operations of conference management services providers. In response to a decision of the United States District Court for the District of Columbia (Civil Action No. 91-1569), the proposed rule would also exclude such "pass-through" amounts would also be excluded for advertising agents.

The SBA reviews requests to exclude revenues of certain business activities on a case-by-case basis. In an August 25, 1992 proposed rule (*See* 57 FR 38452), SBA noted characteristics under which it might be appropriate to exclude from a concern's revenues certain funds received from a client firm to be transmitted to an unaffiliated third party. These include the following five characteristics:

- (1) A broker or agent-like relationship between a firm and its third party provider exists that represents a dominant or crucial activity of firms in these industries.
- (2) The pass-through funds associated with the broker or agent-like relationship is a significant proportion of total receipts.
- (3) As the normal business practice of firms in the industry, a firm's income remaining after the pass-through funds are remitted to a third party is typically derived from a standard commission or fee.
- (4) Firms do not usually consider billings that are reimbursed to other firms as their own income, preferring instead to count only those receipts that are retained for their own use.
- (5) Federal government agencies which engage in the collection of statistics and other industry analysts usually represent receipts of the firms on an adjusted receipts basis.

An analysis of the conference management services industry suggests that most of these characteristics are shared by concerns active in this industry. Conference management

services firms provide a range of services in support of organizing and facilitating conferences, such as travel, lodging, ground transportation, honoraria and other administrative support services. The sponsoring organization is responsible for developing the conference and its contents and for all conference expenses. The conference management service provider principally acts as an agent on behalf of the sponsoring organization by arranging for various support services in connection with the conference and provides few, if any, of the support services itself. The arrangements made through the conference management services provider to a third party provider are paid using the sponsoring organization's funds or by the conference management services provider and later reimbursed by the sponsoring organization. The pass-through monies paid to third-party providers generally account for a majority of the total expenses incurred by the conference management services provider. The conference management services provider's earnings are based on fees or commissions from these activities.

The scope of activities and business operations of conference management services providers appear to conform with the characteristics outlined above to support the exclusion of funds received in trust for an unaffiliated third party. The SBA believes that the revenues a conference management services provider received for a third party provider represents revenues intended for the third party. Accordingly, an exclusion of these types of revenues is warranted. The fees and commissions earned by the conference management services provider from its activities is also a more representative measure of the magnitude of operations of the firm and of the services provided.

Before a final decision is made on the exclusion of pass-through revenues for conference management services firms, the SBA would find additional information helpful on the practices of firms in the conference management services industry. In particular, the SBA seeks comments from the public concerning the typical relationship between clients of conference managers and conference management services providers themselves. Pertinent information would include:

(1) To what extent are funds passed through to other vendors in this industry, particularly the extent of booking costs for transportation, lodging and meeting room space?

(2) To what extent are funds "escrowed" in which the client firm provides an account to

be used by the conference facilitator to "perform a condition" and meet ongoing expenses? What is the typical nature of these accounts in ownership and liability terms?

(3) Are conferences typically planned by the client firm or the independent conference planner? Who prepares the program and selects the speaker? Does the conference management services provider usually act as a mere facilitator or as a planner in which the entire production would be planned by the conference management services provider?

(4) How does the conference management services provider recover costs and make profits? Are arrangements normally on a cost-plus fixed-fee basis, a standard commission basis or fixed price?

This proposed rule does not change the current size standard of \$5.0 million applicable to firms in SIC 8741, Management Services. However, if pass-through funds are excluded from the calculation of revenues for conference management services firms as proposed, it would effectively increase the size standard applicable to these type of firms. At this time, the SBA does not have available data to determine if the \$5.0 million size standard continues to be appropriate for the conference management services industry. Accordingly, the SBA is also seeking information on the economic characteristics of conference management services firms, such as average firm size, the degree of concentration, the size distribution of firms, start-up costs and the difficulty of entry. Other information which may influence the size standard, and the need for a new size standard, may also be submitted. The SBA will consider this information to assess the appropriateness of the current size standard, which may lead to a future rulemaking proposing a different size standard than \$5.0 million.

This proposed rule would also clarify that SBA may use all available information to determine annual receipts when making a size determination, especially if other information is available which disputes a firm's Income Tax returns.

Section 121.402(e)(i) would be redesignated as § 121.104(d) and amended to add language indicating that the annual receipts for a concern and its affiliates are calculated in accordance with proposed § 121.104(b) even though this may result in different time frames being used to calculate the concern's and affiliate's revenues.

Sections 121.403(a) and (b) would be redesignated as §§ 121.105(a) and (b), respectively, and revised for clarity. A new subsection (c) would be added to make it clear that if one entity is replaced by another having the same assets and liabilities, the successor firm

is not a new entity for purposes of calculating annual receipts/employees.

The current definition of employees in § 121.404 would be combined with the definition of number of employees in § 121.407 into proposed § 121.106, and rewritten for clarity. The proposed rule would eliminate the list of numerous factors bearing on the issue of whether individuals are employees of a concern or employees of an independent employment contractor, and simply authorize SBA to look at all relevant factors concerning the issue.

The provisions of § 121.406 would be eliminated as unnecessary. Language indicating that dominance is taken into account in the setting of industry size standards would be added to proposed § 121.102.

The proposed rule would add a new § 121.107 which states the existence of statutory penalties for misrepresentations of size status.

The substance of § 121.601 would be redesignated as § 121.201, which would be amended to eliminate unnecessary language.

The size standards table identified by SIC industry would be greatly streamlined. The redesigned size standard table would list the size standard applying to each Division within the SIC System and each Major Group within that Division if different from the general Division size standard. Only those industries having a size standard different from the applicable Division or Major Group size standard, or those to which a footnote applies, would be specifically listed in the table by four-digit SIC code. This change would eliminate the duplication of listing four-digit SIC code after four-digit SIC code within a Division or Major Group with identical size standards.

The asterisks identifying new SIC codes for 1987 would also be eliminated from the table as no longer relevant or useful.

Many of the footnotes to the size standards in proposed § 121.201 would be clarified and simplified. Some footnotes have been deleted resulting in the need to renumber remaining ones as identified below. Size standards themselves would not be amended by this proposed rule.

Footnote 1 would be deleted as unnecessary. The Table of Size Standards itself, as well as the introductory language to the Table, indicates that size standards are in number of employees or average annual receipts unless otherwise specified.

Footnote 2, redesignated as footnote 1, would be clarified to indicate that the 40 percent requirement in the footnote

applies to government procurement only.

Footnotes 3, 4, and 5, redesignated as footnotes 2, 3, and 4, respectively, would be reworded for clarity.

Footnote 6, redesignated as footnote 5, would be amended by replacing the words "which it manufactured worldwide" with the words "comprising its total worldwide manufacture" to clarify that SBA intended no difference in the application of those words.

The substance of footnote 7 would be transferred into the size standard table for SIC code 4212, and the footnote eliminated.

Footnote 8 would be incorporated into the Table, and eliminated as a separate footnote.

Footnote 9 would be eliminated as unnecessary.

Footnote 10, redesignated as footnote 6, would clarify that gross commissions of a travel, real estate or advertising agency are to be counted when determining such a concern's size, whether paid directly (e.g., through some sort of escrow account) or indirectly (i.e., received first by the agency and then paid to the individual) to individual agents of the concern. SIC codes relating to advertising agents (SIC codes 7311, 7312, 7313, and 7319) and that part of SIC code 8741 dealing with conference management service providers would be added to this footnote.

The substance of footnotes 11 and 12 would be incorporated into the size standard table for SIC codes 4212 and 5599 respectively, and the footnotes eliminated.

Footnote 13 would be deleted as duplicative of restrictions on financial assistance covered in Part 120.

Footnote 14, redesignated as footnote 6, would be revised to incorporate the substance of existing §§ 121.1402(a) and (b).

Footnote 15, redesignated as footnote 7, would be rewritten for clarity.

Footnote 16 would be eliminated and its substance combined with the statement at the beginning of the size standards chart dealing with the \$5 million alternate size standard.

Footnotes 17, 18 and 20 would be clarified for ease of use and renumbered as footnotes 9, 10, and 12, respectively.

Footnotes 21 and 22 would be incorporated into the size Table, and eliminated as separate footnotes.

Footnote 23 would be redesignated as footnote 13.

Sections 121.801 and 121.802 (proposed §§ 121.301 and 121.302) would be amended for clarity and ease of use. The proposed rule would

eliminate differentials in size standards for Redevelopment Areas. Differentials for Redevelopment Areas would be eliminated because almost all counties are so designated, and such designations tend to be permanent or long lasting designations once designated.

Section 121.803(a) (proposed § 121.303(a)) would be amended to clarify that the size of an applicant for financial assistance is determined as of the date the application for such assistance is received by SBA (or, in the case of the preferred lenders program, the date of approval of the loan by the Preferred Lender).

The current § 121.803(b) would be eliminated since it is covered in revised § 121.103(d).

Section 121.803(c), redesignated as § 121.303(b), would be rewritten for clarity.

Sections 121.804 through 121.806 (proposed §§ 121.304 through 121.306) would be rewritten for clarity and ease of use. SBA's Government Contracting Area Directors also would be substituted for staff in regional offices. They are familiar with size issues and principles because of their work in the government procurement area and have sufficient knowledge and expertise to make size determinations pertaining to financial assistance.

Proposed § 121.307 would clarify that a MED concern which qualifies for award of a specific 8(a) subcontract would be eligible for SBA financial assistance to finance the subcontract.

Section 121.901, redesignated as § 121.401, would clarify that it covers MED issues, but that additional size issues pertaining to the MED program are discussed in §§ 121.601 through 121.604.

Sections 121.902 and 121.903 would be redesignated as §§ 121.402 and 121.403, respectively, and revised for clarity.

Section 121.904, redesignated as § 121.404, would be rewritten for clarity and ease of use. The substance of subsection 121.904(b) has been transferred to proposed § 121.103(a)(4). Subsection (c) has been eliminated, and subsection (d) redesignated as subsection (b). This section would also call for determining size as of the date of best and final offers in negotiated procurements (rather than the date of self-certification) when a size protest alleges that a small business dealer is not supplying the product of a small business manufacturer or that a small business' subcontracting plan creates a joint venture that should be considered large. A concern's proposed supplier or subcontractors often will change during the process of negotiation, and it is

unreasonable to expect subcontracting plans to be finalized at the time a concern self-certifies and submits its initial offer on the solicitation.

Sections 121.905 and 121.906, redesignated as §§ 121.405 and 121.406, respectively, would be amended for clarity and ease of use.

Section 121.907 would be redesignated as § 121.407, with the example deleted as unnecessary.

Section 121.908 would be redesignated as § 121.408. Subsections (a) and (b) would be consolidated and would clarify that a formal size determination is required if the size status of an applicant for a COC is at issue. Subsection (c) would be eliminated as duplicative (see § 121.404), and subsection (d) redesignated as subsection (b).

Section 121.909 would be redesignated as § 121.409.

Section 121.910 would be redesignated as § 121.410. Minor editorial changes and a corrected cross-reference would be made in subsections (a) and (b). Language referring to subcontracting for financial services under section 8(d) of the Small Business Act would be transferred to a new subsection (c).

Section 121.911 would be redesignated as § 121.411, and rewritten for clarity. Cross-references to sections would be corrected and a clarification made that prime contractors must notify unsuccessful offerors for Section 8(d) subcontracts of the apparent successful offeror to enable unsuccessful offerors to timely protest the size of the apparent successful offeror where appropriate.

A new § 121.412 would be added to the regulations to clarify that a concern must meet the applicable size standard only for that portion of a partial small business set-aside that is set-aside for small business. The concern is not required to qualify as a small business for that portion of a requirement that is open to both small and large business concerns. For instance, to be eligible as a small business concern for petroleum refining in SIC Code 2911, a concern is required to refine 90 percent of the petroleum from either crude oil or bona fide feedstocks. On a partial small business set-aside, a concern would have to meet this requirement on the portion of the offer that is set-aside, but would not have to meet this requirement on the unrestricted portion.

Sections 121.1001 through 121.1003 would be redesignated as §§ 121.501 through 121.503, and reworded for clarity.

Section 121.1004(a) would be redesignated as § 121.504, and reworded for clarity. The substance of subsection

(b) would be transferred to proposed § 121.103(a)(4).

Section 121.1005 would be redesignated as § 121.505, and reworded for brevity.

Proposed § 121.506 consolidates definitions (important for sales and leases of Government-owned timber) that are presently contained in different sections.

Section 121.1006, redesignated as § 121.507, clarifies that the Alaskan resale limitation applies when the original purchaser, and not necessarily the repurchaser, is an Alaskan business.

Sections 121.1006 through 121.1010 would be renumbered as §§ 121.507 through 121.511, and reworded for clarity and brevity.

Section 121.1011, redesignated as § 121.512, would clarify that SBA considers a concern's affiliates in determining the size of a stockpile purchaser.

Sections 121.1012 and 121.1013 would be redesignated as §§ 121.513 and 121.514, respectively, and amended for clarity and brevity.

Section 121.1101 would be eliminated as unnecessary.

Section 121.1102 would be reorganized for clarity. The substance of subsections (a)(1), (a)(2), and (b)(1) would be redesignated as §§ 121.601, 121.604(a), and 121.603, respectively. The substance of subsections (b)(2), (c) and (d) would be consolidated into § 121.402.

Section 121.1103 would be reorganized for clarity. The substance of subsections (a), (b), and (c) would be redesignated as §§ 121.602, 121.604(a), and 121.605, respectively. The substance of subsection (d) would be consolidated into § 121.404(b).

Section 121.1104 would be redesignated as § 121.604, and amended for clarity.

Sections 121.1105 and 121.1106 would be consolidated into §§ 121.405 and 121.406, respectively.

The substance of 121.1108 would be redesignated as § 121.605.

Section 121.1201 would be redesignated as § 121.701 and the definition of funding agreement in § 121.1202(b) would be moved to this section in order to keep definitions in one place.

Section 121.1202 would be redesignated as § 121.702 and the language would be simplified.

Section 121.1203 would be redesignated as § 121.703 and rewritten for clarity.

Section 121.1204 would be redesignated as § 121.704. The reference to a firm of more than 500 employees being ineligible for award would be deleted as duplicative of revised § 121.702. Section 121.1205 would be redesignated as § 121.705 and amended for clarity.

Sections 121.1301 through 121.1305 would be redesignated as §§ 121.801 through 805, respectively, with slight changes for clarity.

Sections 121.1401 through 121.1405 would be deleted as unnecessary since size eligibility of financial institutions for subcontracting purposes would be addressed in proposed § 121.410(c) and footnote 9 of proposed § 121.201.

Section 121.1501, redesignated as § 121.901 and rewritten for clarity, would address the procedures for size determinations and discretionary appeals currently set forth in § 121.1505.

Sections 121.1502 and 121.1503 would be consolidated into a new § 121.902.

A proposed amendment of § 121.1502 was published in the Federal Register (58 Fed. Reg. 44620) for public comment on August 23, 1993. It would have implemented Section 222 of Public Law 102-366, amending the Small Business Act, to delineate the limited circumstances under which a Federal department or agency may prescribe its own standard for determining whether an entity is a small business concern. After reviewing public comments, SBA has decided to publish for further comment a new proposal for the rule as part of this proposed rule.

After publication of the initial proposal, Congress modified Section 3(a)(2) of the Small Business Act further, thereby affecting two aspects of the proposed rule (See § 301, Public Law 103-403). Public Law 103-403 modified the time period for determining the size of a manufacturing concern from "over a period of not less than three years" to "a manufacturing concern's pay periods for the preceding 12 months." This modification makes the time period of measurement of a

manufacturing concern's size consistent with the time period used by SBA in calculating the size of other business concerns subject to an employee-based size standard. Public Law 103-403 then expanded upon the types of size standard measures that could be used for certain industries. While § 301 requires that the number of employees be used to determine the size of a manufacturing concern, and gross receipts used to determine the size of concerns providing services, § 301 permits these or some other measure of size to be used for size standards for all other industry categories (e.g., retail trade, wholesale trade, and construction). Other measures of size standards could include net worth, net income, or some other quantitative measure that appropriately delineates business concerns by size. These statutory modifications have been incorporated into this final rule.

The current statutory provisions under Section 3(a)(2) of the Small Business Act establish certain requirements for the development of size standards by a Federal department or agency. Those requirements would be repeated in the regulations under this proposal. The head of a Federal department or agency may only prescribe a size standard different from that prescribed by SBA when it is for use in connection with a program of the department or agency, and other statutory criteria are met.

SBA proposes to adopt appropriate measures to implement this statutory authority. As stated in revised § 121.901, SBA applies the rules and procedures contained in this regulation when making size determinations for other agencies. This includes the definition of the size standard measure as well as all other criteria related to the size standard. SBA will consider the use of alternative definitions and other size related criteria by other agencies where appropriate. As required by statute, SBA also is publishing a list of non-SBA size standards currently in effect. The list contained in this proposed rule will be updated periodically by notices published in the Federal Register as non-SBA size standards become established or when additional existing non-SBA size standards are identified. The current list is as follows:

TABLE OF STATUTORY AND REGULATORY SIZE STANDARDS SET BY AGENCIES OTHER THAN SBA

Agency/Program	Size standard	Cite
Bureau of Land Management, Timber Sales	SBA size standards	43 CFR 5400.0-5
Department of Agriculture, SBIR program	Fewer than 500 employees; all requirements of 13 CFR 121.	7 CFR 3403.2(o)

TABLE OF STATUTORY AND REGULATORY SIZE STANDARDS SET BY AGENCIES OTHER THAN SBA—Continued

Agency/Program	Size standard	Cite
Department of the Air Force, Licensing Government-Owned Inventions.	SBA size standards	32 CFR 841.4
Department of the Army, Timber Sales	SBA size standards	32 CFR 644.509
Department of Commerce, International Trade Administration, Antidumping Duty Procedures.	"Small business" means any business concern which, in the agency's judgment, due to its small size, has neither adequate internal resources nor financial ability to obtain qualified outside assistance in preparing and filing petitions and applications for remedies and benefits under trade laws. (19 USC 1339).	19 CFR 353.12
Department of Commerce, International Trade Administration, Countervailing Duty Procedures.	"Small business" means any business concern which, in the agency's judgment, due to its small size, has neither adequate internal resources nor financial ability to obtain qualified outside assistance in preparing and filing petitions and applications for remedies and benefits under trade laws. (19 USC 1339).	19 CFR 355.12
Department of Commerce, Licensing Government-Owned Inventions.	SBA size standards	37 CFR 404.3
Department of Commerce, Patent Rights Clause	SBA size standards	37 CFR 401.14
Department of Commerce, Rights to Inventions	SBA size standards	37 CFR 401.2
Department of Defense, Business Type Certification—Commercial Items.	13 CFR part 121	48 CFR 252.211–7020
Department of Defense, Contract Goals for Small Disadvantaged Businesses.	Section 8(d) of the Small Business Act	10 USC 2323
Department of Defense, Notice of Partial Small Business Set-aside.	13 CFR part 121	48 CFR 252.219–7001
Department of Energy, Domestic Uranium Project	"[A]s defined by SBA"	10 CFR 760.1
Department of Energy, Electric and Hybrid Vehicle Research, Development, Demonstration and Production Loan Guaranties.	13 CFR 121.310	10 CFR 791.3
Department of Energy, Financial Assistance Rules	Not dominant in its field; independently owned and operated; meets criteria of SBA.	10 CFR 600.3
Department of Energy, Financial Assistance Rules—Grants.	Not dominant in its field; independently owned and operated; meets criteria of SBA.	10 CFR 600.3
Department of Energy, Geothermal Loan Guaranty Program.	Not dominant in field; does not have assets in excess of \$9 million or net worth in excess of \$4 million; does not have average net income, after Federal income tax, for the preceding 2 years in excess of \$400,000.	10 CFR 790.5
Department of Energy, Patent Rights of Grantees	13 CFR 121.3–8, 121.3–12	10 CFR 600.33
Department of Energy, State Energy Conservation Program.	SBA regulations	10 CFR 420.2
Department of Housing and Urban Development, Employment Opportunities for Businesses and Lower Income Persons in Connection with Assisted Projects.	SBA size standards	24 CFR 135.5
Department of Labor, OSHA, Occupational Safety and Health Standards, Cadmium.	19 or fewer employees	29 CFR 1910.1027(p)(2)
Department of Transportation, Implementation of §105(f) of the Surface Transportation Assistance Act of 1982.	Section 3 of the Small Business Act and SBA regulations, except that a small business concern will not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual(s) which has average annual gross receipts in excess of \$15 million over the previous 3 fiscal years (amount is increased annually for inflation).	49 CFR 23.62
Department of Transportation, Size Standards for Airport Concessionaires.	See note below for size standards for specific airport concessionaires.	49 CFR 23.89
Department of Transportation, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs.	Small business is a business having not more than 500 employees working at the site being acquired or displaced by a project or program, which site is the location of economic activity. Sites occupied solely by outdoor advertising signs, displays, or devices do not qualify as a business.	49 CFR 24.2(t)
Environmental Protection Agency, Cooperative Agreements and Superfund State Contracts for Superfund Response Actions.	Section 3 of the Small Business Act	40 CFR 30.6015
Environmental Protection Agency, Issuance of Statements Required by §7(g) of the Small Business Act.	SBA size standards	40 CFR 21.2
Environmental Protection Agency, Procurement Under Assistance Agreements.	Small Business Act	40 CFR 33.005
Environmental Protection Agency, Stationary Source Technical and Environmental Compliance Assistance Program.	100 employees	42 USC 7661(f)
Family and Medical Leave Act	Fewer than 50 employees	Public Law 103–1, § 101

TABLE OF STATUTORY AND REGULATORY SIZE STANDARDS SET BY AGENCIES OTHER THAN SBA—Continued

Agency/Program	Size standard	Cite
FAR, Patent Rights, Retention by Contractor (Short Form).	Section 2 of the Small Business Act and SBA regulations.	48 CFR 52.227-11
FAR, Patent Rights, Retention by Contractor (Long Form).	Section 2 of the Small Business Act and SBA regulations.	48 CFR 52.227-12
FAR, Patent Rights Under Government Contracts	16 USC 632 and SBA regulations	48 CFR 27.301
FAR, Size Standards	SBA size standards	48 CFR 19.102
FAR, Small Business Competitiveness Demonstration Program.	Emerging small business: size is no greater than 50% of numerical SIC size standard.	48 CFR 19.1002
FAR, Socioeconomic Programs	13 CFR 121 and not dominant in field	48 CFR 19.001
FAR, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns.	Section 3 of the Small Business Act and SBA regulations.	48 CFR 52.219-8
General Services Administration, Small Business Concern Representation.	13 CFR part 121	48 CFR 552.219-1
Internal Revenue Service, Dollar-value Method of Pricing LIFO Inventories.	Average annual gross receipts of the taxpayer for the 3 preceding taxable years do not exceed \$5 million.	26 CFR 1.472-8
Internal Revenue Service, Loss on Small Business Stock.	(1) Post-1978 stock: capital receipts of small business corporation may not exceed \$1 million (capital receipts means aggregate dollar amount received by the corporation for its stock). (2) Pre-1978 stock: sum of aggregate amount to be paid for pre-1978 stock may not exceed \$500,000.	26 CFR 1.1244(c)-2
Internal Revenue Service, S Corporation Defined	Fewer than 35 shareholders; no shareholder (other than an estate or trust) who is not an individual; no non-resident alien as shareholder; only one class of stock.	26 CFR 1.1361-1
Internal Revenue Service, Simplified Dollar-value LIFO Method for Certain Small Businesses.	Average annual gross receipts of the taxpayer for the 3 preceding taxable years do not exceed \$5 million.	26 USC 474
Internal Revenue Service, Subchapter S Corporation	Fewer than 35 shareholders; no shareholder (other than an estate or trust) who is not an individual; no non-resident alien as shareholder; only one class of stock.	26 USC 1361(b)(1)(A)
International Trade Commission, Trade Remedy Assistance.	SBA size standards	19 CFR 213.2
Interstate Commerce Commission, Negotiated Rates Act.	Small Business Act	49 USC 10701
NASA, Licensing of Inventions	13 CFR 121.3-8 and 121.3-12	14 CFR 1245.202
NASA, Patent Rights—Retention by Grantee	13 CFR 121.3-8 and 121.3-12	14 CFR 1260 App.
National Science Foundation, Patent Rights of Grantee .	13 CFR 121.3-8 and 121.3-12	45 CFR 650.4
Patent and Trademark Office	13 CFR 121.12	37 CFR 1.9
Regulatory Flexibility Act	Section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.	5 USC 601
Securities & Exchange Commission, Integrated Disclosure System for Small Business Issuers.	Small business issuer-revenues less than \$25 million; US or Canadian issuer; not an investment company; if a majority owned subsidiary, parent corporation must also be a small business issuer.	17 CFR 228.10
Securities & Exchange Commission Registration and Reporting.	Small business issuer-revenues less than \$25 million; US or Canadian issuer; not an investment company; if a majority owned subsidiary, parent corporation must also be a small business issuer.	17 CFR 240.12b-2
Selective Service, Placement of Orders	500 employees	50 App. USC 468(a)
Federal Communications Commission, Licensing of Broadband Personal Communications Services.	\$40 million in average annual gross revenues	47 CFR 24.720(b)(1)
Federal Communications Commission, Licensing of Narrowband Personal Communications Services.	\$40 million in average annual gross revenues and \$40 million in personal net worth.	47 CFR 24.320(b)
Federal Communications Commission, Licensing of Multipoint Distribution Services (Wireless Cable).	\$40 million in average annual gross revenues	47 CFR 21.961(b)
Federal Communications Commission, Regulatory Relief for Small Cable Entities.	Small cable systems of 15,000 or fewer subscribers owned by cable companies with 400,000 or fewer subscribers.	47 CFR 76.901(c)
Nuclear Regulatory Commission, Regulatory Flexibility Analyses.	\$5 million in average annual gross revenues for concerns providing services and 500 employees for manufacturing concerns.	10 CFR 2.810
Department of the Treasury, Office of the Comptroller of the Currency, Community Reinvestment Act.	\$1 million in average annual gross revenues	12 CFR 25.22(b)(3)
Department of the Treasury, Office of Thrift Supervision, Community Reinvestment Act.	\$1 million in average annual gross revenues	12 CFR 563e.22(b)(3)(iii)
Board of Governors of the Federal Reserve System, Community Reinvestment Act.	\$1 million in average annual gross revenues	12 CFR 228.22(b)(3)(ii)

TABLE OF STATUTORY AND REGULATORY SIZE STANDARDS SET BY AGENCIES OTHER THAN SBA—Continued

Agency/Program	Size standard	Cite
Federal Deposit Insurance Corporation, Community Reinvestment Act.	\$1 million in average annual gross revenues	12 CFR 345.22(b)(3)(ii)
Department of Agriculture, Commodity Credit Corporation, Market Promotion Program.	SBA size standards	7 CFR 1485.11(o)

Note for Airport Concessionaire Size Standards

Following is a list of the maximum average annual gross receipts in the preceding 3 years (in millions of dollars):

Concession	Amount
Food and beverage	30.00
Book stores	30.00
Auto rental	40.00
Banks	¹ 100.00
Hotels and motels	30.00
Insurance machines and counters ..	30.00
Gift, novelty, and souvenir shop	30.00
Newsstands	30.00
Shoe shine stands	30.00
Barber shops	30.00
Automobile parking	30.00
Jewelry stores	30.00
Liquor stores	30.00
Travel agencies	30.00
Drug stores	30.00
Pastries and baked goods	30.00
Luggage cart rental	30.00
Coin-operated T.V.'s	30.00
Game rooms	30.00
Luggage and leather goods stores	30.00
Candy, nut, and confectionery	
stores	30.00
Toy stores	30.00
Beauty shops	30.00
Vending machines	30.00
Coin-operated lockers	30.00
Florists	30.00
Advertising	30.00
Taxicab	30.00
Limousines	30.00
Duty free shops	30.00
Pay telephones	² 1,500
Gambling machines	30.00
Other concessions not shown	
above	30.00

¹ As measured by total assets.
² Number of employees.

SBA will briefly describe and respond to the comments received in response to its initial proposed rule regarding alternate size standards of other agencies. Several of the commenters, although supportive of the proposed rule, identified the following issues that they felt warranted further clarification or modification to the proposed procedures. These issues are identified below along with the SBA's response.

Definition and Calculation of Average Annual Receipts and Number of Employees: The commenters raised two questions concerning annual average receipts and number of employees—

how are these terms defined and how are they calculated? As specified in revised § 121.901, the SBA utilizes its rules, standards and procedures when making size determinations for other agencies. For clarification on the definition and calculation of size standard measures, § 121.902(b)(1)(ii)(D) of this part has been added to incorporate, by reference, the SBA's criteria for defining and calculating gross receipts and number of employees. The SBA's policy of applying the criteria specified in this regulation to another agency's size standard does not preclude a department or agency from requesting a change to the definition of procedures regarding its size standard. Such request would be part of the SBA's review of the proposed size standard.

Size Standard Measures: Two commenters suggested that these regulations should permit the use of size standard measures other than gross receipts and number of employees, such as net worth, and permit the use of number of employees for non-manufacturing industries. For non-SBA size standards, the law clearly requires that the size standard for manufacturing concerns be established based on number of employees, and for concerns providing services that the size standards be established based on gross receipts. SBA believes that the statutory changes pursuant to § 301 of Public Law 103-403 permit an agency to request establishment of a size standard for all other types of concerns (e.g., agriculture, construction, retail trade) based on gross receipts, number of employees or another quantitative measure of size suitable for the purpose and industry under consideration, and this final rule allows a department or agency to make such a request.

Application of Size Standards to Programs: The comments reviewed reflected confusion about the application of non-SBA size standards to Federal government programs. Several commenters indicated that they were unsure if non-SBA size standards were only to be used within a specific department or agency, even though a program may be implemented across several agencies or departments. Second, some commenters appeared to be under the misunderstanding that

individual agencies would be able to establish their own size standards for use in SBA programs within their agency.

These regulations allow departments and agencies to prescribe unique size standards only for programs under their responsibility. For example, this means that size standards established by the Department of Transportation for a program under its control are applicable to all departments or agencies that must also implement such a program. Similarly, the SBA size standards are applicable to all programs under the SBA area of cognizance, regardless of where implemented. This means that the SBA size standards must be used by all departments and agencies for the Small Business Set-Aside and MED Programs.

In another case, a statute may require the use of SBA's size standards or refer to small business as defined under the Small Business Act. An example is the Department of Defense's Small Disadvantaged Business Program. In those cases, the SBA size standards clearly must be used. However, if use of SBA's size standards has not been statutorily required, a Federal department or agency is free to either use the SBA's size standards or endeavor to obtain the approval of SBA to establish a different size standard.

Size Determinations and Appeals to Non-SBA Size Standards: A commenter raised the question of how size determinations and appeals would be made for non-SBA size standards in cases involving a dispute over the size status of a business concern. When requested, the SBA will provide size determinations for other Federal government agencies, even in cases where size standards are established by statute or the SBA has approved size standards different from its own size standards (See proposed § 121.1001(b)(6)). The SBA also provides a discretionary appeal process from such size determinations that would be available to other Federal agencies. The procedures regarding size appeals are contained in part 134 (See proposed § 121.1102).

Documentation for SBA Review of Non-SBA Size Standards: A commenter requested clarification on what

documentation must accompany its requests for approval of non-SBA size standards, particularly regarding submission of copies of comments received on the proposed rule. In order for the SBA to properly evaluate requests to issue proposed rules, an agency proposing a size standard shall provide the SBA with (1) the reasons for proposing a size standard different from the SBA's size standard, and (2) industry related data or other data supporting its proposed size standard. In order to properly evaluate each request for non-SBA size standards and approve the issuance of a final rule, the SBA shall also be provided with copies of all comments that relate to the establishment of the size standard, not just copies of all comments received on the proposed rule. The SBA has modified a provision of the proposed rule to specify that only comments related to the size standard need to be provided to the SBA as part of its review of an agency final rule.

Another commenter recommended modifying the requirement to provide the SBA with a copy of the final rule prior to approval by the SBA's Administrator. To expedite the SBA's review of the size standard at this stage of the rulemaking process, the commenter recommended that agencies be allowed to submit the intended size standard with an accompanying justification. The SBA agrees, and has modified this provision of the proposed rule. When possible, the requesting agency should submit a draft final rule and preamble. However, correspondence containing a justification for the intended size standard is acceptable, provided the agency furnishes the SBA a copy of the final rule and its preamble before submitting it for publication in the Federal Register.

Clarify "Other Factors" Considered by the SBA Administrator: Several commenters requested clarification on the information the SBA believes it should review when complying with the requirement to "consider other factors the Administrator deems to be relevant." When establishing or approving size standards, the SBA Administrator is required to ensure that size standards vary by industry to the extent necessary to reflect industry differences and to consider other relevant factors. The SBA generally evaluates the structural characteristics of an industry to determine the appropriate differences between industry size standards. These characteristics include, but are not limited to: average firm size, industry competition, the extent of industry

dominance by large firms, the distribution of sales and employees by firm size, and start-up costs. Other relevant factors generally pertain to all other types of information that could influence the decision on the size standard. Although this may vary for each request, several important factors would include the goals and objectives of the program, the impact of the size standard on small businesses, conventional industry business practices, and the administration and application of size standard requirements.

Timeliness of SBA Decisions on Approval Process: Several commenters were concerned about the timeliness of the SBA approval process and what impact it might have on rulemaking. The SBA shares this concern and will make every effort to ensure that the regulatory process is not delayed. However, the SBA believes specifying a time frame for these reviews is impractical. Each request will likely have different implications. That makes estimating within this rule a definite completion date for a review inappropriate. The SBA will, as a matter of policy, respond to requests for non-SBA size standards within 30 days. Where the SBA cannot respond within 30 days, the agency will advise the requester as soon as possible.

SBA Reviews and Legislation Providing Authority to Establish Size Standard: One comment questioned the need for an agency to request the SBA's approval for a non-SBA size standard if the enabling legislation for a particular program specifically authorized the agency to establish a size standard without specifying a size standard.

The SBA believes that if the enabling legislation does not designate the size standard, the department or agency would be required to follow the approval procedures specified in the Small Business Act and these regulations. Only in instances in which legislation specifically establishes a size standard would an agency or department be exempted from these procedures.

Section 121.1504 would be redesignated as § 121.903, and reworded in plain English.

Section 121.1601 would be redesignated as § 121.1001 and reworded for clarity. The section would be revised to reflect the new names of offices under SBA's reorganization. References to the Agency's regional offices would be changed to the offices of SBA Government Contracting Area Director or SBA District Director, as appropriate. Reference to any inactive assistance program would be deleted. In

addition, proposed § 121.1001(b)(1)(iv) would be amended by expanding the first sentence to clarify existing policy. The regulations currently state that a large business may initiate a size protest as an interested party if only one offer was received. This change would clarify that this does not include a concern that is found to be other than small for a particular procurement protesting the size of the only remaining offeror.

Proposed § 121.1001(b)(5) (present § 121.1601(a)(5)) would be amended to clarify that SBA will make size determinations when a procurement is unrestricted, and that the Office of Hearings and Appeals (OHA) will issue decisions on size appeals and Standard Industrial Classification (SIC) code appeals on unrestricted procurements. This change is necessary because OHA has issued decisions in the past that the SBA regional offices have no jurisdiction to make size determinations when a procurement is unrestricted, and that OHA has no jurisdiction over size appeals or SIC Code appeals when a procurement is unrestricted. SBA disagrees with OHA's interpretation of the existing regulations, and therefore proposes to clarify the regulations. OHA has said that small business status is beneficial only for small business set-aside contracts. This is not true. Small business status is beneficial in unrestricted procurements as well for the following reasons, among others:

1. Small Businesses receive the contract award in the case of a tie bid with a large business.
2. Small businesses are eligible to apply for a Certificate of Competency when a contracting officer makes a determination of non-responsibility.
3. Small businesses are exempt from the Cost Accounting Standards.
4. Small businesses may receive accelerated progress payments.
5. Small businesses are exempt from submitting subcontracting plans.

In the January 1, 1990, revision to 13 CFR Part 121, SBA attempted to clarify this issue by providing the example of the tie bids and the Certificate of Competency eligibility. It was not SBA's intention to limit size determinations and size appeals to just those two examples when a procurement is unrestricted. However, after publication of the revised regulations, OHA ruled that it would not make a decision on a size determination appeal unless there were tie bids or the contracting officer made a determination of non-responsibility. There are many benefits to being a small business in unrestricted procurements. It is SBA's policy to make size determinations when a

protest is received on any unrestricted procurement, regardless of whether there is an apparent benefit at the time the protest is received. Additionally, SBA is attempting to clarify that OHA has jurisdiction to issue decisions concerning SIC appeals on unrestricted procurements. Currently, a concern has no recourse when a contracting officer issues an unrestricted solicitation with an incorrect SIC Code.

The revised § 121.1001 would be further amended to use the term "headquarters" in lieu of the term "principal office" in referring to a concern's primary headquarters. SBA believes the term "headquarters" more accurately describes the location where a firm's business or corporate records are maintained and business decisions are made.

Section 121.1602 would be redesignated as § 121.1002, rewritten for clarity, and amended to provide for changes in offices responsible for making formal size determinations as a result of the Agency's reorganization. The Government Contracting Area Director would assume the responsibilities formerly held by SBA regional administrators for making size determinations. The term "headquarters" would be used instead of "principal offices" when describing the primary location of a concern's executive office.

Section 121.1603 would be broken out into proposed §§ 121.1003 through 121.1006 for ease of use and clarity. Individual sections would be created relating to where a protest should be filed, what time limits apply to size protests, how a protest must be filed with the contracting officer, and referral of a size protest to the appropriate SBA Government Contracting Area Office.

Proposed § 121.1004 would clarify that although a protest filed by a contracting officer is timely whether filed before or after award, such a protest will be dismissed by SBA as premature if filed before the selection of the apparent successful offeror. This change would prohibit a contracting officer from protesting the size of several concerns at once (e.g., all firms found to be in the competitive range) and would authorize a protest only after the apparent successful offeror has been selected.

Section 121.1604(a) and (b) would be redesignated as § 121.1007(b) and (c), reworded for clarity, and the examples deleted. A portion of present § 121.1601(a)(1)(iv) would be added to proposed § 121.1007 as subsection (a) for the purpose of clarifying that a protest not pertaining to a particular procurement or sale would not be acted

upon by SBA. Subsection (c) which pertains to appeals of dismissals would be eliminated as unnecessary in this section addressing size determinations.

Section 121.1605 would be redesignated as § 121.1008 and would be reworded for clarity and user ease. In addition, the revised § 121.1008(a) would be amended to allow any overnight mail delivery service that provides proof of receipt to be used in the size determination process. This change is necessary in order that size determinations may be made in a timely manner.

Section 121.1606 would be redesignated as § 121.1009. Its provisions would be reworded for clarity. The revision would permit use of any overnight mail delivery service that provides proof of receipt to be used in the size determination process. The change would assist SBA in making size determinations in a timely manner. Paragraph (g)(3) would be further amended to provide that a concern which had self certified as small on a pending procurement or assistance application would have to provide notice of any adverse size determination to officials responsible for the pending procurement or assistance request. Subsection (h) would be added to permit the SBA office that performed a formal size determination to reopen that determination in the limited instance where the size determination contains clear administrative error or a clear mistake of fact, provided that no appeal has been taken to OHA and that no contract has been awarded. This provision would permit SBA to correct the error or mistake without requiring the filing of an appeal at OHA.

Section 121.1607 would be redesignated as § 121.1010. The proposed provision would be reworded for ease of use and clarity.

Section 121.1701 would be amended and the substance of subsections (a) and (b) redesignated as § 121.1101 and § 121.1103, respectively. Proposed § 121.1101 would materially alter the right of a party adversely affected by a size determination to appeal the adverse determination to OHA and further provide that OHA has the unfettered discretion to select and review formal size determinations. There would no longer be a right to appeal a size determination. SBA believes that this amended procedure will simplify and speed the final consideration of size status issues. Unless a petition for review is accepted by OHA, the size determinations made by Government Contracting offices and disaster area offices would be final Agency decisions and would end the size determination

process. Under the revised procedures, the procurement process generally would not be delayed because of size determination appeals to OHA. OHA could elect to consider any size determination appeal request.

Section 121.1702 has been eliminated. Part of proposed § 121.1101 simply references procedures for discretionary OHA reviews as contained in part 134.

Section 121.1703(a) would be incorporated into § 121.1101. Sections 121.1703 (b) and (c) would be incorporated into §§ 121.1103, and 121.1703(d) would be eliminated.

Section 121.1704 would be incorporated into § 121.1103. The revised section would address procedures for appealing SIC code designations. The revision would provide that appeal procedures would be those outlined in FAR 19-303.

Sections 121.1705 through 121.1722 would be eliminated and their substance transferred to part 134.

Sections 121.2001 through 121.2005 would be redesignated as §§ 121.1201 through 121.1206. The sections would be revised to reflect better clarity and organizational content. The substance of these provisions would remain substantially unaffected. Minor editorial changes would be made, for example, to eliminate outdated information such as procurement funding levels for prior years. The content of the current § 121.2004 would be rearranged in a more logical sequence. Where organizational titles have changed, the revisions would adopt the new titles.

Sections 121.2101 through 121.2104 would be redesignated as §§ 121.1301-121.1304, respectively. § 121.2105 would be incorporated into proposed § 121.1304, and § 121.2106 would be redesignated as § 121.1305. Minor editorial changes pertaining to class waivers would be made for ease of reading and use.

In addition, SBA is proposing to incorporate in these sections procedural rules pertaining to individual waivers of the Nonmanufacturer Rule for specific solicitations. On November 15, 1988, the enactment of Public Law 100-656 incorporated into the Small Business Act the previously existing SBA requirement that recipients of small business set-asides or SBA 8(a) subcontracts for manufactured products that are not the actual manufacturers (nonmanufacturers) be themselves small business regular dealers. This legislation specifies that regular dealers may provide only the product of domestic small business manufacturers or processors on small business set-asides and 8(a) procurements. This requirement is commonly known as the

Nonmanufacturer Rule. Section 303(h) of Public Law 100-656 authorized the Administrator of the SBA to grant a waiver of the Nonmanufacturer Rule for a product or class of products for which there are no small business manufacturers or processors in the Federal market. The requirement that a small business supplier provide a product manufactured or processed by a small business concern in the U.S. under a contract set-aside for small business or under an SBA 8(a) subcontract is found in SBA regulations at §§ 121.406(b). On June 15, 1989, Public Law 101-37 renumbered the elements in the Nonmanufacturer Rule and added the requirement that a small business concern must meet the numerical size standard for the Standard Industrial Classification code assigned to the contract solicitation on which the offer is being made. Further, on November 15, 1990, Public Law 101-574 modified the wording of the waiver provision. The new wording allowed the Administrator of the SBA to waive the requirement for any product or class of products for which there is no small business manufacturer or processor "available to participate in the Federal procurement market." The law also added a provision which allows the Administrator to waive the requirements of the Nonmanufacturer Rule after receiving a determination by the contracting officer stating that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specification, including period of performance, required of an offeror on a solicitation.

On September 21, 1993, SBA published in the Federal Register proposed procedural rules for individual waivers of the Nonmanufacturer Rule. SBA received two sets of comments in response to the proposed rule. Due to the passage of time since the proposed rule was originally published, SBA is not issuing final regulations pertaining to individual waivers but is again proposing revised regulations taking into account the comments received. The first commenter was the United States Department of the Interior, Geological Survey (DOI). Its first comment was a request to include in the regulations a definition of "nonmanufacturing." Since this term is not used in the proposed regulations, a definition is unnecessary.

DOI's second comment was a request to clarify the language of the regulation by shortening word and sentence lengths. SBA reviewed the regulation and, where possible, reduced the length

of the sentences and the size of the words.

The second commenter was a small business wholesaler who submitted four comments. The first comment was that SBA should review and grant class waivers for individual items. The statute authorizing waivers does permit class waivers for products for which there are no small business manufacturers available to participate in the Federal procurement market and current SBA regulations already address this. Consequently, no action on the comment is necessary.

The small business wholesaler's second comment was that a SBA Business Opportunity Specialist should be allowed to request waivers for individual procurements. Waivers for individual procurements are routinely granted for both small business set-asides and SBA 8(a) subcontracts. SBA believes that the best procedure to maintain administrative consistency is to allow only the procuring agencies' contracting officers to request individual waivers for both set-asides and 8(a) awards. We believe that the procuring agency contracting officer ultimately responsible for contract award is the most qualified individual to determine whether small business products are available and/or meet the specifications of a particular solicitation.

The small business wholesaler's third comment was that SBA state procurement center representatives should be allowed to request individual waivers of the Nonmanufacturer Rule. Public Law 101-574, Section 210, is explicit in its language allowing only contracting officers to request individual waivers. Therefore, SBA has no authority to allow anyone other than contracting officers to request individual waivers of the Nonmanufacturer Rule.

The fourth comment by the small business wholesaler was that SBA 8(a) subcontractors should be allowed to request individual waivers of the Nonmanufacturer Rule. As with the commenter's third comment, Public Law 101-574, Section 210, is explicit in its language allowing only contracting officers to request individual waivers.

Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

SBA certifies that this proposed rule would not be considered a significant rule within the meaning of Executive Order 12866 and would not have a significant economic impact on a

substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. This rule is would clarify SBA's procedural and definitional size rules, but would not change the size standard for any particular industry. As such, size eligibility for the various SBA programs should not be affected by this proposal. The rule would have no effect on the amount or dollar value of any Federal contract requirements or of any financial assistance provided through SBA. Therefore, it is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this proposed rule, if adopted in final form, would contain no new reporting or recordkeeping requirements.

For purposes of Executive Order 12612, SBA certifies that this rule would not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in Section 2 of that Order.

List of Subjects in 13 CFR Part 121

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

Accordingly, pursuant to the authority set forth in sections 3(a) and 5(b)(6) of the Small Business Act, 15 U.S.C. 632(a) and 634(b)(6), SBA hereby proposes to revise part 121 of Title 13, Code of Federal Regulations (CFR), to read as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

Subpart A—Size Eligibility Provisions and Standards

Provisions of General Applicability

Sec.

- 121.101 What are SBA size standards?
- 121.102 How does SBA establish size standards?
- 121.103 What is affiliation?
- 121.104 How does SBA calculate annual receipts?
- 121.105 How does SBA define "business concern or concern"?
- 121.106 How does SBA calculate number of employees?
- 121.107 How does SBA determine a concern's "primary industry"?

- 121.108 What are the penalties for misrepresentation of size status?
- Size Standards Used To Define Small Business Concerns
- 6121.201 What size standards has SBA identified by Standard Industrial Classification codes?
- Size Eligibility Requirements for SBA Financial Assistance
- 6121.301 What size standards are applicable to financial assistance programs?
- 6121.302 When does SBA determine the size status of an applicant?
- 6121.303 What size procedures are used by SBA before it makes a formal size determination?
- 6121.304 What are the size requirements for refinancing an existing SBA loan?
- 6121.305 What size eligibility requirements exist for obtaining business loans relating to particular procurements?
- Size Eligibility Requirements for Government Procurement
- 6121.401 What procurement programs are subject to size determinations?
- 6121.402 What size standards are applicable to procurement assistance programs?
- 6121.403 Are SBA size determinations and SIC code designations binding on parties?
- 6121.404 When does SBA determine the size status of a business concern?
- 6121.405 May a business concern self-certify its small business size status?
- 6121.406 How does a small business concern qualify to provide manufactured products under small business set-aside or MED procurements?
- 6121.407 What are the size procedures for multiple item procurements?
- 6121.408 What are the size procedures for SBA's Certificate of Competency Program?
- 6121.409 What size standard applies in an unrestricted procurement for Certificate of Competency purposes?
- 6121.410 What are the size standards for SBA's Section 8(d) Subcontracting Program?
- 6121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?
- 6121.412 What are the size procedures for partial small business set-asides?
- Size Eligibility Requirements for Sales or Lease Of Government Property
- 6121.501 What programs for sales or leases of Government property are subject to size determinations?
- 6121.502 What size standards are applicable to programs for sales or leases of Government property?
- 6121.503 Are SBA size determinations binding on parties?
- 6121.504 When does SBA determine the size status of a business concern?
- 6121.505 What is the effect of a self-certification?
- 6121.506 What definitions are important for sales or leases of Government-owned timber?
- 6121.507 What are the size standards and other requirements for the purchase of Government-owned timber (other than Special Salvage timber)?
- 6121.508 What are the size standards and other requirements for the purchase of Government-owned Special Salvage Timber?
- 6121.509 What is the size standard for leasing of Government land for coal mining?
- 6121.510 What is the size standard for leasing of Government land for uranium mining?
- 6121.511 What is the size standard for buying Government-owned petroleum?
- 6121.512 What is the size standard for stockpile purchases?
- Size Eligibility Requirements for the Minority Enterprise Development (MED) Program
- 6121.601 What is a small business for purposes of admission to SBA's Minority Enterprise Development (MED) Program?
- 6121.602 At what point in time must a MED applicant be small?
- 6121.603 How does SBA determine whether a Participant is small for a particular MED subcontract?
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- Size Eligibility Requirements for the Small Business Innovation Research (SBIR) Program
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- 6121.705 Must a business concern self-certify its size status?
- Size Eligibility Requirements for Paying Reduced Patent Fees
- 6121.801 May patent fees be reduced if a concern is small?
- 6121.802 What size standards are applicable to reduced patent fees program?
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- 121.805 May a business concern self-certify its size status?
- Size Eligibility Requirements for Compliance With Programs of Other Agencies
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- 121.902 What size standards are applicable to programs of other agencies?
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- Procedures for Size Protests and Requests for Formal Size Determinations
- 121.1001 Who may initiate a size protest or a request for formal size determination?
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- 121.1003 Where should a size protest be filed?
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- 121.1010 How does a concern become recertified as a small business?
- Appeals of Size Determinations and SIC Code Designations
- 121.1101 Are formal size determinations subject to appeal?
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- Subpart B—Other Eligibility Provisions**
- Eligibility of Organizations for the Handicapped for Small Business Set-asides
- 121.1201 May handicapped organizations be awarded Federal procurements set aside for small business?
- 121.1202 What is an organization for the handicapped?
- 121.1203 Who are handicapped individuals?
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- 121.1205 What are the procedures for filing protests of the status of handicapped organizations?
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- Waivers of the Nonmanufacturer Rule for Classes of Products
- 121.1301 What is the Nonmanufacturer Rule?
- 121.1302 When will a waiver of the Nonmanufacturer Rule be granted for a class of products?
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- 121.1304 What are the procedures for requesting and granting waivers?
 121.1305 How is a list of previously granted class waivers obtained?

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a) and 644(c); and Pub. L. 102-486, 106 Stat. 2776, 3133.

Provisions of General Applicability

§ 121.101 What are SBA size standards?

SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for "small business" concerns. Size standards have been established for types of economic activity, or industry, generally under the Standard Industrial Classification (SIC) System. The SIC System is described in the "Standard Industrial Classification Manual" published by the Office of Management and Budget, Executive Office of the President, and sold by the U.S. Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954. The SIC System assigns four-digit SIC codes to all economic activity within ten major divisions. Section 121.201 describes the size standards now established. A full table matching a size standard with each four-digit SIC code is also published annually by SBA in the Federal Register.

§ 121.102 How does SBA establish size standards?

(a) SBA considers economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size. It also considers technological changes, competition from other industries, growth trends, historical activity within an industry, unique factors occurring in the industry which may distinguish small firms from other firms, and the objectives of its programs and the impact on those programs of different size standard levels.

(b) As part of its review of a size standard, SBA will investigate if any concern at or below a particular standard would be dominant in the industry. SBA will take into consideration market share of a concern and other appropriate factors which may allow a concern to exercise a major controlling influence on a national basis in which a number of business concerns are engaged. Size standards seek to ensure that a concern that meets a specific size standard is not dominant in its field of operation.

(c) Please address any requests to change existing size standards or establish new ones for emerging

industries to the Assistant Administrator for Size Standards, Small Business Administration, 409 3rd Street, S.W., Washington, D.C. 20416.

§ 121.103 What is affiliation?

(a) *General Principles of Affiliation.*

(1) Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.

(2) SBA considers factors such as ownership, management, and contractual relationships, in determining whether affiliation exists.

(3) Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, may be treated as one party with such interests aggregated.

(4) SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size.

(b) *Exclusion from affiliation coverage.* (1) Business concerns owned in whole or substantial part by investment companies licensed, or development companies qualifying, under the Small Business Investment Act of 1958, as amended, or by Investment Companies registered under the Investment Company Act of 1940, as amended, are not considered affiliates of such investment companies or development companies.

(2) Business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

(3) Business concerns which are part of a SBA approved pool of concerns for a joint program of research and development as authorized by the Small Business Act are not affiliates of one another because of the pool.

(4) Business concerns which lease employees from concerns primarily engaged in leasing employees to other businesses are not affiliated with the leasing company solely on the basis of a leasing agreement.

(5) For financial, management, or technical assistance under the Small

Business Investment Company program, an applicant concern will not be affiliated with the following investors, provided the investors do not control the concern other than to the extent that would be permitted under § 107.865 of this chapter:

(i) Venture capital operating companies as defined in the U.S. Department of Labor Regulations found at 29 CFR 2510.3-101(d);

(ii) Employee benefit or pension plans established and maintained by the Federal government or by any state, their political subdivisions, or any agency or instrumentality thereof for the benefit of employees;

(iii) Employee benefit or pension plans within the meaning of the Employee Retirement Income Security Act of 1974; or

(iv) Charitable trusts, foundations, endowments, or similar organizations exempt from Federal income taxation under Section 501(c) of the Internal Revenue Code of 1986.

(6) A protege firm is not an affiliate of a mentor firm solely because the protege firm receives assistance from the mentor firm under Federal Mentor-Protege programs.

(c) *Affiliation based on stock ownership.* (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock.

(2) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

(d) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Since stock options, convertible debentures, and agreements to merge (including agreements in principle) affect the power to control a concern, SBA treats them as though the rights granted have been exercised (except that an affiliate cannot use them to appear to terminate control over another concern before it actually does so). SBA gives present effect to an agreement to merge or sell stock whether such agreement is unconditional, conditional, or finalized but unexecuted. Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered

"agreements in principle" and, thus, are not given present effect.

(e) *Affiliation based on common management.* Affiliation arises where one or more officers, directors or general partners controls the board of directors and/or the management of another concern.

(f) *Affiliation based on joint venture arrangements.* (1) Parties to a joint venture are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture.

(2) Concerns bidding on a particular procurement or property sale as joint venturers are affiliated with each other with regard to performance of that contract.

(3) A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

(4) For size purposes, a concern must include in its revenues its proportionate share of joint venture receipts.

(g) *Affiliation based on franchise and license agreements.* The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the latter has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

§ 121.104 How does SBA calculate annual receipts?

(a) *Definitions.* In determining annual receipts of a concern:

(1) *Receipts* is defined as gross or total income, plus cost of goods sold, as reported on a concern's Federal Income Tax return. However, the term receipts excludes net capital gains or losses, taxes collected for and remitted to a taxing authority if included in gross or total income, proceeds from the transactions between a concern and its domestic or foreign affiliates (if also excluded from gross or total income on a consolidated return filed with the IRS), and amounts collected for another

by a travel agent, real estate agent, advertising agent, or conference management service provider.

(2) *Completed fiscal year* means a taxable year including any short period. Taxable year and short period have the meaning attributed to them by the IRS.

(3) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

(b) *Period of measurement.* (1) Annual receipts of a concern which has been in business for 3 or more completed fiscal years means the receipts of the concern over its last 3 completed fiscal years divided by three.

(2) Annual receipts of a concern which has been in business for less than 3 complete fiscal years means the receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Annual receipts of a concern which has been in business 3 or more complete fiscal years but has a short year as one of those years means the receipts for the short year and the two full fiscal years divided by the number of weeks in the short year and the two full fiscal years, multiplied by 52.

(c) *Use of information other than the Federal tax return.* Where other information gives SBA reason to regard Federal Income Tax returns as false, SBA may base its size determination on such other information.

(d) *Annual receipts of affiliates.* (1) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period or before small business self-certification, the annual receipts in determining size status include the receipts of both firms. Furthermore, this aggregation applies for the entire applicable period used in computing size rather than only for the period after the affiliation arose. Receipts are determined for the concern and its affiliates in accordance with paragraph (b) of this section even though this may result in different periods being used to calculate annual receipts.

(2) The annual receipts of a former affiliate are not included as annual receipts if affiliation ceased before the date used for determining size. This exclusion of annual receipts of a former affiliate applies during the entire period used in computing size, rather than only for the period after which the affiliation ceased.

§ 121.105 How does SBA define "business concern or concern"?

(a) 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.

§ 121.106 How does SBA calculate number of employees?

(a) Employees counted in determining size include all individuals employed on a full-time, part-time, temporary, or other basis. SBA will consider the totality of the circumstances, including factors relevant for tax purposes, in determining whether individuals are employees of the concern in question.

(b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles:

(1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

(3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

(4) The treatment of employees of former affiliates or recently acquired affiliates is the same as for size determinations using annual receipts in § 121.104(d).

§ 121.107 How does SBA determine a concern's "primary industry"?

In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal

year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

§ 121.108 What are the penalties for misrepresentation of size status?

In addition to other laws which may be applicable, section 16(d) of the Small Business Act, 15 U.S.C. 645(d), provides severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs. Section 16(a) of the Act also provides, in part, for

criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing in any way the actions of the Agency.

Size Standards Used to Define Small Business Concerns

§ 121.201 What size standards has SBA identified by Standard Industrial Classification codes?

The size standards described in this section apply to all SBA programs

unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small. The following is a listing of size standards for industries under the SIC System. Size standards are listed by Division and apply to all industries in that Division except those specifically listed with separate size standards.

SIZE STANDARDS BY SIC INDUSTRY

SIC code and description	Size standards in number of employees or millions of dollars
DIVISION A—AGRICULTURE	
MAJOR GROUP 01—AGRICULTURAL PRODUCTION-CROPS	0.5
MAJOR GROUPS 02—LIVESTOCK AND ANIMAL SPECIALTIES	0.5
EXCEPT:	
0211 Beef Cattle Feedlots (Custom)	1.5
0252 Chicken Eggs	9.0
MAJOR GROUP 07—AGRICULTURAL SERVICES	5.0
MAJOR GROUP 08—FORESTRY	5.0
MAJOR GROUP 09—FISHING, HUNTING, AND TRAPPING	3.0
DIVISION B—MINING	
MAJOR GROUP 10—METAL MINING	500
MAJOR GROUP 12—COAL MINING	500
MAJOR GROUP 13—OIL AND GAS EXTRACTION AND MAJOR GROUP 14—MINING AND QUARRYING OF NONMETALLIC MINERALS, EXCEPT FUELS.	500
EXCEPT:	
1081 Metal Mining Services	5.0
1241 Coal Mining Services	5.0
1382 Oil and Gas Field Exploration Services	5.0
1389 Oil and Gas Field Services, N.E.C.	5.0
DIVISION C—CONSTRUCTION	
MAJOR GROUP 15—GENERAL BUILDING CONTRACTORS	17.0
MAJOR GROUP 16—HEAVY CONSTRUCTION, NON BUILDING	17.0
EXCEPT:	
1629 (Part) Dredging and Surface Cleanup Activities	13.5 ¹
MAJOR GROUP 17—CONSTRUCTION—SPECIAL TRADE CONTRACTORS	7.0
DIVISION D—MANUFACTURING ²	500
EXCEPT:	
2032 Canned Specialties	1,000
2033 Canned Fruits, Vegetables, Preserves, Jams and Jellies	500 ³
2043 Cereal Breakfast Foods	1,000
2046 Wet Corn Milling	750
2052 Cookies and Crackers	750
2062 Cane Sugar Refining	750
2063 Beet Sugar	750
2076 Vegetable Oil Mills, Except Corn, Cottonseed, and Soybean	1,000
2079 Shortening, Table Oils, Margarine, and Other Edible Fats and Oils, N.E.C	750
2085 Distilled and Blended Liquors	750
2111 Cigarettes	1,000
2211 Broadwoven Fabric Mills, Cotton	1,000
2261 Finishers of Broadwoven Fabrics of Cotton	1,000
2295 Coated Fabrics, Not Rubberized	1,000
2296 Tire Cord and Fabrics	1,000
2611 Pulp Mills	750
2621 Paper Mills	750
2631 Paperboard Mills	750
2656 Sanitary Food Containers, Except Folding	750
2657 Folding Paperboard Boxes, Including Sanitary	750

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC code and description	Size standards in number of employees or millions of dollars
2812 Alkalies and Chlorine	1,000
2813 Industrial Gases	1,000
2816 Inorganic Pigments	1,000
2819 Industrial Inorganic Chemicals, N.E.C	1,000
2821 Plastics Materials, Synthetic Resins, and Nonvulcanizable Elastomers	750
2822 Synthetic Rubber (Vulcanizable Elastomers)	1,000
2823 Cellulosic Manmade Fibers	1,000
2824 Manmade Organic Fibers, Except Cellulosic	1,000
2833 Medicinal Chemicals and Botanical Products	750
2834 Pharmaceutical Preparations	750
2841 Soap and Other Detergents, Except Specialty Cleaners	750
2865 Cyclic Organic Crudes and Intermediates, and Organic Dyes and Pigments	750
2869 Industrial Organic Chemicals, N.E.C	1,000
2873 Nitrogenous Fertilizers	1,000
2892 Explosives	750
2911 Petroleum Refining	1,500 ⁴
2952 Asphalt Felts and Coatings	750
3011 Tires and Inner Tubes	1,000 ⁵
3021 Rubber and Plastics Footwear	1,000
3211 Flat Glass	1,000
3221 Glass Containers	750
3229 Pressed and Blown Glass and Glassware, N.E.C	750
3241 Cement, Hydraulic	750
3261 Vitreous China Plumbing Fixtures and China and Earthenware Fittings and Bathroom Accessories	750
3275 Gypsum Products	1,000
3292 Asbestos Products	750
3296 Mineral Wool	750
3297 Nonclay Refractories	750
3312 Steel Works, Blast Furnaces (Including Coke Ovens), and Rolling Mills	1,000
3313 Electrometallurgical Products, Except Steel	750
3315 Steel Wiredrawing and Steel Nails and Spikes	1,000
3316 Cold-Rolled Steel Sheet, Strip, and Bars	1,000
3317 Steel Pipe and Tubes	1,000
3331 Primary Smelting and Refining of Copper	1,000
3334 Primary Production of Aluminum	1,000
3339 Primary Smelting and Refining of Nonferrous Metals, Except Copper and Aluminum	750
3351 Rolling, Drawing, and Extruding of Copper	750
3353 Aluminum Sheet, Plate, and Foil	750
3354 Aluminum Extruded Products	750
3355 Aluminum Rolling and Drawing, N.E.C	750
3356 Rolling, Drawing, and Extruding of Nonferrous Metals, Except Copper and Aluminum	750
3357 Drawing and Insulating of Nonferrous Wire	1,000
3398 Metal Heat Treating	750
3399 Primary Metal Products, N.E.C	750
3411 Metal Cans	1,000
3431 Enameled Iron and Metal Sanitary Ware	750
3482 Small Arms Ammunition	1,000
3483 Ammunition, Except for Small Arms	1,500
3484 Small Arms	1,000
3511 Steam, Gas, and Hydraulic Turbines, and Turbine Generator Set Units	1,000
3519 Internal Combustion Engines, N.E.C	1,000
3531 Construction Machinery and Equipment	750
3537 Industrial Trucks, Tractors, Trailers, and Stackers	750
3562 Ball and Roller Bearings	750
3571 Electronic Computers	1,000
3572 Computer Storage Devices	1,000
3575 Computer Terminals	1,000
3577 Computer Peripheral Equipment, N.E.C	1,000
3578 Calculating and Accounting Machines, Except Electronic Computers	1,000
3585 Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment	750
3612 Power, Distribution, and Speciality Transformers	750
3613 Switchgear and Switchboard Apparatus	750
3621 Motors and Generators	1,000
3624 Carbon and Graphite Products	750
3625 Relays and Industrial Controls	750
3631 Household Cooking Equipment	750
3632 Household Refrigerators and Home and Farm Freezers	1,000
3633 Household Laundry Equipment	1,000

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC code and description	Size stand- ards in num- ber of em- ployees or millions of dollars
3634 Electric Housewares and Fans	750
3635 Household Vacuum Cleaners	750
3641 Electric Lamp Bulbs and Tubes	1,000
3651 Household Audio and Video Equipment	750
3652 Phonograph Records and Prerecorded Audio Tapes and Disks	750
3661 Telephone and Telegraph Apparatus	1,000
3663 Radio and Television Broadcasting and Communications Equipment	750
3669 Communications Equipment, N.E.C	750
3671 Electron Tubes	750
3692 Primary Batteries, Dry and Wet	1,000
3694 Electrical Equipment for Internal Combustion Engines	750
3695 Magnetic and Optical Recording Media	1,000
3699 Electrical Machinery, Equipment, and Supplies, N.E.C	750
3711 Motor Vehicles and Passenger Car Bodies	1,000
3714 Motor Vehicle Parts and Accessories	750
3716 Motor Homes	1,000
3721 Aircraft	1,500
3724 Aircraft Engines and Engine Parts	1,000
3728 Aircraft Parts and Auxiliary Equipment, N.E.C	1,000 ⁹
3731 Shipbuilding and Repair of Nuclear Propelled Ships	1,000
Shipbuilding of Nonnuclear Propelled Ships and Nonpropelled Ships	1,000
Ship Repair (Including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships East of the 108 Meridian.	1,000
Ships Repair (Including Overhauls and Conversion) Performed on Nonnuclear Propelled and Nonpropelled Ships West of the 108 Meridian.	1,000
3743 Railroad Equipment	1,000
3761 Guided Missiles and Space Vehicles	1,000
3764 Guided Missile and Space Vehicle Propulsion Units and Propulsion Units Parts	1,000
3769 Guided Missiles and Space Vehicle Parts and Auxiliary Equipment, N.E.C	1,000
3795 Tanks and Tank Components	1,000
3812 Search, Detection, Navigation, Guidance, Aeronautical, and Nautical Systems and Instruments	750
3996 Linoleum, Asphalted-Felt-Base, and Other Hard Surface Floor Coverings, N.E.C	750

DIVISION E—TRANSPORTATION, COMMUNICATIONS ELECTRIC, GAS, AND SANITARY SERVICES

MAJOR GROUP 40—RAILROAD TRANSPORTATION	1500
EXCEPT:	
4013 Railroad Switching and Terminal Establishments	500
MAJOR GROUP 41—LOCAL AND SUBURBAN TRANSIT AND INTERURBAN HIGHWAY AND PASSENGER TRANSPOR- TATION.	5.0
MAJOR GROUP 42—MOTOR FREIGHT TRANSPORTATION AND WAREHOUSING	18.5
EXCEPT:	
4212 (Part) Garbage and Refuse Collection, Without Disposal	6.0
4231 Terminal and Joint Terminal Maintenance Facilities for Motor Freight Transportation	5.0
MAJOR GROUP 44—WATER TRANSPORTATION	500
EXCEPT:	
4491 Marine Cargo Handling	18.5
4492 Towing and Tugboat Services	5.0
4493 Marinas	5.0
4499 Water Transportation Services, N.E.C.	5.0
Offshore Marine Water Transportation Services	20.5
MAJOR GROUP 45—TRANSPORTATION BY AIR	1500
EXCEPT:	
4522 Air Transportation, Nonscheduled	1500
Offshore Marine Air Transportation Services	20.5
4581 Airports, Flying Fields, and Airport Terminal Services	5.0
MAJOR GROUP 46—PIPELINES, EXCEPT NATURAL GAS	1500
EXCEPT:	
4619 Pipelines, N.E.C.	25.0
MAJOR GROUP 47—TRANSPORTATION SERVICES	5.0
EXCEPT:	
4724 Travel Agencies	1.0 ⁶
4731 Arrangement of Transportation of Freight and Cargo	18.5
4783 Packing and Crating	18.5
MAJOR GROUP 48—COMMUNICATIONS:	
4812 Radiotelephone Communications	1,500
4813 Telephone Communications, Except Radiotelephone	1,500

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC code and description	Size standards in number of employees or millions of dollars
4822 Telegraph and Other Message Communications	5.0
4832 Radio Broadcasting Stations	5.0
4833 Television Broadcasting Stations	10.5
4841 Cable and Other Pay Television Services	11.0
4899 Communications Services, N.E.C.	11.0
MAJOR GROUP 49—ELECTRIC, GAS, AND SANITARY SERVICES	5.0
EXCEPT:	
4911 Electric Services	4 million megawatt hrs.
4924 Natural Gas Distribution	500
4953 Refuse Systems	6.0
4961 Steam and Air-Conditioning Supply	9.0
DIVISION F—WHOLESALE TRADE	100
(Not Applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies.)	
DIVISION G—RETAIL TRADE	5.0
(Not Applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies.)	
5271 Mobile Home Dealers	9.5
5311 Department Stores	20.0
5331 Variety Stores	8.0
5411 Grocery Stores	20.0
5511 Motor Vehicle Dealers (New and Used)	21.0
5521 Motor Vehicle Dealers (Used Only)	17.0
5541 Gasoline Service Stations	6.5
5599 Automobile Dealers, N.E.C.	5.0
Aircraft Dealers, Retail	7.5
5611 Men's and Boy's Clothing and Accessory Stores	6.5
5621 Women's Clothing Stores	6.5
5651 Family Clothing Stores	6.5
5661 Shoe Stores	6.5
5722 Household Appliance Stores	6.5
5731 Radio, Television, and Consumer Electronics Stores	6.5
5734 Computer and Computer Software Stores	6.5
5812 Food Service, Institutional	15.0
5961 Catalog and Mail-Order Houses	18.5
5983 Fuel Oil Dealers	9.0
DIVISION H—FINANCE, INSURANCE, AND REAL ESTATE	5.0
EXCEPT:	
6021-6082 National and Commercial Banks, Savings, Institutions and Credit Unions	100 Million in assets ⁷
6331 Fire, Marine, and Casualty Insurance	1,500
6515 (Part) Leasing of Building Space to Federal Government by Owners	15.0 ⁸
6531 Real Estate Agents and Managers	1.5 ⁶
DIVISION I—SERVICES	5.0
EXCEPT:	
7211 Power Laundries, Family and Commercial	10.5
7213 Linen Supply	10.5
7216 Drycleaning Plants, Except Rug Cleaning	3.5
7217 Carpet and Upholstery Cleaning	3.5
7218 Industrial Launderers	10.5
7311 Advertising Agencies	5.0 ⁶
7312 Outdoor Advertising Services	5.0 ⁶
7313 Radio, Television, and Publishers' Advertising Representatives	5.0 ⁶
7319 Advertising, N.E.C.	5.0 ⁶
7349 Building Cleaning and Maintenance Services, N.E.C.	12.0
7371 Computer Programming Services	18.0
7372 Prepackaged Software	18.0
7373 Computer Integrated Systems Design	18.0
7374 Computer Processing and Data Preparation and Processing Services	18.0
7375 Information Retrieval Services	18.0
7376 Computer Facilities Management Services	18.0
7377 Computer Rental and Leasing	18.0
7378 Computer Maintenance and Repair	18.0
7379 Computer Related Services, N.E.C.	18.0
7381 Detective, Guard, and Armored Car Services	9.0
7382 Security Systems Services	9.0

SIZE STANDARDS BY SIC INDUSTRY—Continued

SIC code and description	Size stand- ards in num- ber of em- ployees or millions of dollars
7389 Business Services, N.E.C.	5.0
Map Drafting Services, Mapmaking (Including Aerial) and Photogrammetric Mapping Services	3.5
7513 Truck Rental and Leasing, Without Drivers	18.5
7514 Passenger Car Rental	18.5
7515 Passenger Car Leasing	18.5
7534 Tire Retreading and Repair Shops	10.5
7699 Repair Shops and Related Services, N.E.C.	5.0 ⁹
7812 Motion Picture and Video Tape Production	21.5
7819 Services Allied to Motion Picture Production	21.5
7822 Motion Picture and Video Tape Distribution	21.5
8299 Flight Training Services	18.5
8711 Engineering Services	2.5
Military and Aerospace Equipment and Military Weapons	20.0
Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992	20.0
Marine Engineering and Naval Architecture	13.5
8712 Architectural Services (Other Than Naval)	2.5
8713 Surveying Services	2.5
8721 Accounting, Auditing, and Bookkeeping Services	6.0
8731 Commercial Physical and Biological Research	500 ¹⁰
Aircraft	1,500
Aircraft Parts, and Auxiliary Equipment, and Aircraft Engines and Engine Parts	1,000
Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Units Parts, and their Auxiliary Equipment and Parts	1,000
8741 (Part) Conference Management Services	5.0 ⁶
8744 Facilities Support Management Services	5.0 ¹¹
Base Maintenance	20.0 ¹²
Environmental Remediation Services	500 ¹³

Footnotes:

¹ SIC code 1629—Dredging: To be considered small for purpose of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern.

² SIC Division D—Manufacturing: For rebuilding machinery or equipment on a factory basis, or equivalent, use the SIC code for a newly manufactured product. Concerns performing major rebuilding or overhaul activities do not necessarily have to meet the criteria for being a “manufacturer” although the activities may be classified under a manufacturing SIC code. Ordinary repair services or preservation are not considered rebuilding.

³ SIC code 2033: For purposes of Government procurement for food canning and preserving, the standard of 500 employees excludes agricultural labor as defined in § 3306(k) of the Internal Revenue Code, 26 U.S.C. 3306(k).

⁴ SIC code 2911: For purposes of Government procurement, the firm may not have more than 1,500 employees nor more than 75,000 barrels per day capacity of petroleum-based inputs, including crude oil or bona fide feedstocks. Capacity includes owned or leased facilities as well as facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput. The total product to be delivered under the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

⁵ SIC code 3011: For purposes of Government procurement, a firm is small for bidding on a contract for pneumatic tires within Census Classification codes 30111 and 30112, provided that: (1) The value of tires within Census Classification codes 30111 and 30112 which it manufactured in the United States during the previous calendar year is more than 50 percent of the value of its total worldwide manufacture, (2) the value of pneumatic tires within Census Classification codes 30111 and 30112 comprising its total worldwide manufacture during the preceding calendar year was less than 5 percent of the value of all such tires manufactured in the United States during that period, and (3) the value of the principal product which it manufactured or otherwise produced, or sold worldwide during the preceding calendar year is less than 10 percent of the total value of such products manufactured or otherwise produced or sold in the United States during that period.

⁶ SIC codes 4724, 6531, 7311, 7312, 7313, 7319, and 8741: As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.

⁷ A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. Assets for the purposes of this size standard means the assets defined according to the Federal Financial Institution Examinations Council 034 call report form.

⁸ SIC code 6515: Leasing of building space to the Federal Government by Owners: For Government procurement, a size standard of \$15.0 million in gross receipts applies to the owners of building space leased to the Federal Government. The standard does not apply to an agent.

⁹ SIC codes 7699 and 3728: Contracts for the rebuilding or overhaul of aircraft ground support equipment on a contract basis are classified under SIC 3728.

¹⁰ SIC code 8731: For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard is that of the manufacturing industry.

(1) Research and Development means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

(2) For purposes of the Small Business Innovation Research (SBIR) program only, a different definition has been established by law. See § 121.701 of these regulations.

(3) Research and development for guided missiles and space vehicles includes evaluation and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

¹¹ Facilities Management, a component of SIC code 8744, includes establishments, not elsewhere classified, which provide overall management and the personnel to perform a variety of related support services in operating a complete facility in or around a specific building, or within another business or Government establishment. Facilities management means furnishing three or more personnel supply services which may include, but are not limited to, secretarial services, typists, telephone answering, reproduction or mimeograph service, mailing service, financial or business management, public relations, conference planning, travel arrangements, word processing, maintaining files and/or libraries, switchboard operation, writers, bookkeeping, minor office equipment maintenance and repair, or use of information systems (not programming).

¹²SIC code 8744: (1) If one of the activities of base maintenance, as defined below, can be identified with a separate industry and that activity (or industry) accounts for 50 percent or more of the value of an entire contract, then the proper size standard is that of the particular industry, and not the base maintenance size standard.

(2) "Base Maintenance" requires the performance of three or more separate activities in the areas of service or special trade construction industries. If services are performed, these activities must each be in a separate SIC code including, but not limited to, Janitorial and Custodial Service, Fire Prevention Service, Messenger Service, Commissary Service, Protective Guard Service, and Grounds Maintenance and Landscaping Service. If the contract requires the use of special trade contractors (plumbing, painting, plastering, carpentry, etc.), all such special trade construction activities are considered a single activity and classified as Base Housing Maintenance. Since Base Housing Maintenance is only one activity, two additional activities are required for a contract to be classified as "Base Maintenance."

¹³SIC code 8744: (1) For SBA assistance as a small business concern in the industry of Environmental Remediation Services, other than for Government procurement, a concern must be engaged primarily in furnishing a range of services for the remediation of a contaminated environment to an acceptable condition including, but not limited to, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, containment, remedial action, removal of contaminated materials, storage of contaminated materials and security and site closeouts. If one of such activities accounts for 50 percent or more of a concern's total revenues, employees, or other related factors, the concern's primary industry is that of the particular industry and not the Environmental Remediation Services Industry.

(2) For purposes of classifying a Government procurement as Environmental Remediation Services, the general purpose of the procurement must be to restore a contaminated environment and also the procurement must be composed of activities in three or more separate industries with separate SIC codes or, in some instances (e.g., engineering), smaller sub-components of SIC codes with separate, distinct size standards. These activities may include, but are not limited to, separate activities in industries such as: Heavy Construction; Special Trade Construction; Engineering Services; Architectural Services; Management Services; Refuse Systems; Sanitary Services, Not Elsewhere Classified; Local Trucking Without Storage; Testing Laboratories; and Commercial, Physical and Biological Research. If any activity in the procurement can be identified with a separate SIC code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard is the one for that particular industry, and not the Environmental Remediation Service size standard.

Size Eligibility For SBA Financial Assistance

§ 121.301 What size standards are applicable to financial assistance programs?

(a) For Business Loans and Disaster Loans (other than physical disaster loans), an applicant must not exceed the size standard for the industry in which:

- (1) The applicant combined with its affiliates is primarily engaged; and
- (2) The applicant alone is primarily engaged.

(b) For Development Company programs, an applicant must meet one of the following standards:

- (1) Including its affiliates, net worth not in excess of \$6 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$2 million; or
- (2) The same standards applicable under paragraph (a) of this section.

(c) For the Small Business Investment Company (SBIC) program, an applicant must meet one of the following standards:

- (1) Including its affiliates, net worth not in excess of \$18 million average and net income after Federal income taxes (excluding any carry-over losses) for the preceding 2 completed fiscal years not in excess of \$6 million; or
- (2) The same standards applicable under paragraph (a) of this section.

(d) For Surety Bond Guarantee assistance—

- (1) Any construction (general or special trade) concern or concern performing a contract for services is small if its average annual receipts do not exceed \$5.0 million.
- (2) Any concern not specified in paragraph (d)(1) of this section must meet the size standard for the primary

industry in which it, combined with its affiliates, is engaged.

(e) The applicable size standards for the purpose of all SBA financial assistance programs, excluding the Surety Bond Guarantee assistance program, are increased by 25 percent whenever the applicant agrees to use the assistance within a labor surplus area. Labor surplus areas are listed monthly in the Department of Labor publication called "Area Trends."

§ 121.302 When does SBA determine the size status of an applicant?

(a) The size of an applicant for SBA financial assistance is determined as of the date the application for such financial assistance is received by SBA, except for the Disaster Loan and Preferred Lenders programs.

(b) For the Preferred Lenders program, size is determined as of the date of approval of the loan by the Preferred Lender.

(c) For disaster loan assistance (other than physical disaster loans), size status is determined as of the date the disaster commenced, as set forth in the Disaster Declaration.

(d) Changes in size subsequent to the applicable date when size is determined will not disqualify an applicant for assistance.

§ 121.303 What size procedures are used by SBA before it makes a formal size determination?

(a) A concern that submits an application for financial assistance is deemed to have certified that it is small under the applicable size standard. SBA may question the concern's status based on information supplied in the application or from any other source.

(b) A small business investment company, a development company, a surety bond company, or a preferred

lender may accept as true the size information provided by an applicant, unless credible evidence to the contrary is apparent.

(c) Size is initially considered by the individual with final financial assistance authority. This is not a formal size determination. A formal determination may be requested prior to a denial of eligibility based on size.

(d) An applicant may request a formal size determination when assistance has been denied for size ineligibility. Except for disaster loan eligibility, a request for a formal size determination must be made to the Government Contracting Area Director serving the area in which the headquarters of the applicant is located, regardless of the location of the parent company or affiliates. For disaster loan assistance, the request for a size determination must be made to the Area Director for the Disaster Area Office which denied the assistance.

(e) There are no time limitations for making a formal size determination for purposes of financial assistance. The official making the formal size determination must provide a copy of the determination to the applicant, to the requesting SBA official, and to other interested SBA program officials.

§ 121.304 What are the size requirements for refinancing an existing SBA loan?

If natural growth (as distinguished from merger, acquisition or similar management action) since the date of original financing causes a firm to exceed its applicable size standard, it will still be small for the purpose of refinancing an existing SBA loan or guarantee. Otherwise, the firm and its affiliates must be small at the time of application for refinancing.

§ 121.305 What size eligibility requirements exist for obtaining business loans relating to particular procurements?

A concern qualified as small for a particular procurement, including an 8(a) subcontract, is small for financial assistance directly and primarily relating to the performance of the particular procurement.

Size Eligibility Requirements for Government Procurement

§ 121.401 What procurement programs are subject to size determinations?

The requirements set forth in §§ 121.401–121.412 cover all procurement programs for which status as a small business is required, including the small business set-aside program, SBA's Certificate of Competency Program, SBA's Minority Enterprise Development program, the Small Business Subcontracting program authorized under section 8(d) of the Small Business Act, and federal Small Disadvantaged Business programs.

§ 121.402 What size standards are applicable to procurement assistance programs?

(a) A concern must meet the size standard for the SIC code specified in the solicitation.

(b) The procuring agency contracting officer, or authorized representative, designates the proper SIC code and size standard in a solicitation, selecting the SIC code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the SIC Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased. Other factors considered include previous Government procurement classifications of the same or similar products or services, and the classification which would best serve the purposes of the Small Business Act. A procurement is usually classified according to the component which accounts for the greatest percentage of contract value.

(c) The SIC code assigned to a procurement and its corresponding size standard is final unless timely appealed to SBA's Office of Hearings and Appeals (OHA), or unless SBA assigns a SIC code or size standard as provided in paragraph (d) of this section.

(d) An unclear, incomplete or missing SIC code designation or size standard in the solicitation may be clarified, completed or supplied by SBA in

connection with a formal size determination or size appeal.

(e) Any offeror or other interested party adversely affected by a SIC code designation or size standard designation may appeal the designations to OHA under Part 134 of this chapter.

§ 121.403 Are SBA size determinations and SIC code designations binding on parties?

Formal size determinations and SIC code designations made by authorized SBA officials are binding upon the parties. Opinions otherwise provided by SBA officials to contracting officers or others are advisory in nature, and are not binding or appealable.

§ 121.404 When does SBA determine the size status of a business concern?

Generally, SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price. The following are two exceptions to this rule:

(a) The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC.

(b) Size status for purposes of compliance with the nonmanufacturer rule set forth in § 121.406(b)(1) and the ostensible subcontractor rule set forth in § 121.103(f)(3) is determined as of the date of the best and final offer.

§ 121.405 May a business concern self-certify its small business size status?

(a) A concern must self-certify it is small under the size standard specified in the solicitation, or as clarified, completed or supplied by SBA pursuant to § 121.402(d).

(b) A contracting officer may accept a concern's self-certification as true for the particular procurement involved in the absence of a written protest by other offerors or other credible information which causes the contracting officer or SBA to question the size of the concern.

(c) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001–121.1009.

§ 121.406 How does a small business concern qualify to provide manufactured products under small business set-aside or MED procurements?

(a) *General.* In order to qualify as a small business concern for a small business set-aside or 8(a) contract to provide manufactured products, an offeror must either:

(1) Be the manufacturer of the end item being procured (and the end item

must be manufactured or produced in the United States); or

(2) Comply with the requirements of paragraphs (b), (c) or (d) of this section as a nonmanufacturer, a kit assembler or a supplier under Simplified Acquisition Procedures.

(b) *Nonmanufacturers.* (1) A concern may qualify for a requirement to provide manufactured products as a nonmanufacturer if it:

(i) Does not exceed 500 employees;

(ii) Is primarily engaged in the wholesale or retail trade and normally sells the items being supplied to the general public; and

(iii) Will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(3) of this section.

(2) For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:

(i) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit; and

(ii) The importance of the elements added by the concern to the function of the end item, regardless of their relative value.

(3) The Administrator or designee may waive the requirement set forth in paragraph (b)(1)(iii) of this section under the following two circumstances:

(i) The contracting officer has determined 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 and SBA reviews and accepts that determination; or

(ii) SBA determines that no small business manufacturer or processor of

the product or class of products is available to participate in the Federal procurement market.

(4) The two waiver possibilities identified in paragraph (b)(3) of this section are called "individual" waivers and "class" waivers respectively, and the procedures for them are contained in § 121.1301.

(5) Any SBA waiver of the nonmanufacturer rule has no effect on requirements external to the Small Business Act which involve domestic sources of supply, such as the Buy American Act.

(c) *Kit assemblers.* (1) Where the manufactured item being acquired is a kit of supplies or other goods provided by an offeror for a special purpose, the offeror cannot exceed 500 employees, and 50 percent of the total value of the components of the kit must be manufactured by business concerns in the United States which are small under the size standards for the SIC codes of the components being assembled. The offeror need not itself be the manufacturer of any of the items assembled.

(2) Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such item shall be excluded from the calculation of total value in paragraph (c)(1) of this section.

(d) *Simplified Acquisition Procedures.* Where the procurement of a manufactured item is processed under Simplified Acquisition Procedures, as defined in § 13.101 of the Federal Acquisition Regulation (FAR) (48 CFR 13.101), and where the anticipated cost of the procurement will not exceed \$25,000, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States, and the offeror does not exceed 500 employees. The offeror need not itself be the manufacturer of any of the items acquired.

§ 121.407 What are the size procedures for multiple item procurements?

If a procurement calls for two or more specific end items or types of services with different size standards and the offeror may submit an offer on any or all end items or types of services, the offeror must meet the size standard for each end item or service item for which it submits an offer. If the procurement calls for more than one specific end item or type of service and an offeror is required to submit an offer on all items, the offeror may qualify as a small business for the procurement if it meets the size standard of the item which

accounts for the greatest percentage of the total contract value.

§ 121.408 What are the size procedures for SBA's Certificate of Competency Program?

(a) A firm which applies for a COC must file an "Application for Small Business Size Determination" (SBA Form 355). If the initial review of SBA Form 355 indicates the applicant, including its affiliates, is small for purposes of the COC program, SBA will process the application for COC. If the review indicates the applicant, including its affiliates, is other than small, SBA will initiate a formal size determination as set forth in § 121.1009. In such a case, SBA will not further process the COC application until a formal size determination is made.

(b) A concern is ineligible for a COC if a formal SBA size determination finds the concern other than small.

§ 121.409 What size standard applies in an unrestricted procurement for Certificate of Competency purposes?

For the purpose of receiving a Certificate of Competency in an unrestricted procurement, the applicable size standard is that corresponding to the SIC code set forth in the solicitation. For a manufactured product, a concern must also furnish a domestically produced or manufactured product, regardless of the size status of the product manufacturer. The offeror need not be the manufacturer of any of the items acquired.

§ 121.410 What are the size standards for SBA's Section 8(d) Subcontracting Program?

For subcontracting purposes pursuant to section 8(d) of the Small Business Act, a concern is small:

(a) For subcontracts of \$10,000 or less which relate to Government procurements, if its number of employees (including its affiliates) does not exceed 500 employees. However, subcontracts for engineering services awarded under the National Energy Policy Act of 1992 have the same size standard as Military and Aerospace Equipment and Military Weapons under SIC code 8711;

(b) For subcontracts exceeding \$10,000 which relate to Government procurements, if its number of employees or average annual receipts (including its affiliates) does not exceed the size standard for the product or service it is providing on the subcontract; and

(c) For subcontracts for financial services, if the concern (including its affiliates) is a commercial bank or savings and loan association whose assets do not exceed \$100 million.

§ 121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

(a) Prime contractors may rely on the information contained in SBA's System Procurement Automated Source System (PASS), or equivalent data base maintained or sanctioned by SBA, as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list. Even though a concern is on a small business source list, it must still qualify and self-certify as a small business at the time it submits its offer as a section 8(d) subcontractor.

(b) Upon determination of the successful subcontract offeror for a competitive subcontract, but prior to award, the prime contractor must inform each unsuccessful subcontract offeror in writing of the name and location of the apparent successful offeror.

(c) The self-certification of a concern subcontracting or proposing to subcontract under section 8(d) of the Small Business Act may be protested by the contracting officer, the prime contractor, the appropriate SBA official or any other interested party.

§ 121.412 What are the size procedures for partial small business set-asides?

A firm is required to meet size standard requirements only for the small business set-aside portion of a procurement, and is not required to qualify as a small business for the unrestricted portion.

Size Eligibility Requirements for Sale or Lease of Government Property

§ 121.501 What programs for sale or lease of Government property are subject to size determinations?

Sections 121.501–121.512 apply to small business size determinations for the purpose of the sale or lease of Government property, including the Timber Sales Program, the Special Salvage Timber Sales Program, and the sale of Government petroleum, coal and uranium.

§ 121.502 What size standards are applicable to programs for sale or lease of Government property?

(a) Unless otherwise specified in this part—

(1) A concern primarily engaged in manufacturing is small for sale or lease of Government property if it does not exceed 500 employees;

(2) A concern not primarily engaged in manufacturing is small for sale or lease of Government property if it has annual receipts not exceeding \$2 million.

(b) Size status for such sales and leases is determined by the primary industry of the applicant business concern.

§ 121.503 Are SBA size determinations binding on parties?

Formal size determinations based upon a specific Government sale or lease, or made in response to a request from another Government agency under § 121.901, are binding upon the parties. Other SBA opinions provided to contracting officers or others are only advisory, and are not binding or appealable.

§ 121.504 When does SBA determine the size status of a business concern?

SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the Government as part of its initial offer including price where there is a specific sale or lease at issue, or as set forth in § 121.903 if made in response to a request of another Government agency.

§ 121.505 What is the effect of a self-certification?

(a) A contracting officer may accept a concern's self-certification as true for the particular sale or lease involved, in the absence of a written protest by other offerors or other credible information which would cause the contracting officer or SBA to question the size of the concern.

(b) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001–121.1009.

§ 121.506 What definitions are important for sales or leases of Government-owned timber?

(a) *Forest product industry* means logging, wood preserving, and the manufacture of lumber and wood related products such as veneer, plywood, hardboard, particle board, or wood pulp, and of products of which lumber or wood related products are the principal raw materials.

(b) *Logging of timber* means felling and bucking, yarding, and/or loading. It does not mean hauling.

(c) *Manufacture of logs* means, at a minimum, breaking down logs into rough cuts of the finished product.

(d) *Sell* means, in addition to its usual and customary meaning, the exchange of sawlogs for sawlogs on a product-for-product basis with or without monetary adjustment, and an indirect transfer, such as the sale of the assets of a concern after it has been awarded one or more set-aside sales of timber.

(e) *Significant logging of timber* means that a concern uses its own employees to

perform at least two of the following: felling and bucking, yarding, and loading.

§ 121.507 What are the size standards and other requirements for the purchase of Government-owned timber (other than Special Salvage Timber)?

(a) To be small for purposes of the sale of Government-owned timber (other than Special Salvage Timber) a concern must:

(1) Be primarily engaged in the logging or forest products industry;

(2) Not exceed 500 employees, taking into account its affiliates; and

(3) If it does not intend at the time of the offer to resell the timber—

(i) Agree that it will manufacture the logs with its own facilities or those of another business which meets the requirements of paragraphs (a)(1) and (a)(2) of this section;

(ii) Agree that if it eventually resells the timber, it will resell no more than 30% of the sawtimber volume to other businesses which do not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(iii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume to businesses which do meet the requirements of paragraphs (a)(1) and (a)(2) of this section; or

(4) If it intends at the time of offer to resell the timber—

(i) Agree that it will not sell more than 30% of such timber (50% of such timber if the concern is an Alaskan business) to a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(ii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume (or at least 50% of the sawtimber volume, if it is an Alaskan business) to businesses which meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(b) For a period of three years following the date upon which a concern purchases timber under a small business set-aside (other than through the Special Salvage Timber Sale program), it must maintain a record of:

(1) The name, address and size status of every concern to which it sells the timber or sawlogs; and

(2) The species, grades and volumes of sawlogs sold.

(c) For a period of three years following the date upon which a concern purchases timber, it must by contract require all small business repurchasers of the sawlogs or timber it purchased under the small business set-aside to maintain the records described in paragraph (b) of this section.

§ 121.508 What are the size standards and other requirements for the purchase of Government-owned Special Salvage Timber?

(a) In order to purchase Government-owned Special Salvage Timber from the United States Forest Service or the Bureau of Land Management as a small business, a concern must:

(1) Be primarily engaged in the logging or forest product industry;

(2) Have, together with its affiliates, no more than twenty-five employees during any pay period for the last twelve months; and

(3) If it does not intend at the time of offer to resell the timber—

(i) Agree that it will manufacture a significant portion of the logs with its own employees; and

(ii) Agree that it will log the timber only with its own employees or with employees of another business which is eligible for award of a Special Salvage Timber sales contract; or

(4) If it intends at the time of offer to resell the timber, agree that it will perform a significant portion of timber logging with its own employees and that it will subcontract the remainder of the timber logging to a concern which is eligible for award of a Special Salvage Timber sales contract.

§ 121.509 What is the size standard for leasing of Government land for coal mining?

A concern is small for this purpose if it:

(a) Together with its affiliates, does not have more than 250 employees;

(b) Maintains management and control of the actual mining operations of the tract; and

(c) Agrees that if it sublease the Government land, it will be to another small business, and that it will require its sublessors to agree to the same.

§ 121.510 What is the size standard for leasing of Government land for uranium mining?

A concern is small for this purpose if it, together with its affiliates, does not have more than 100 employees.

§ 121.511 What is the size standard for buying Government-owned petroleum?

A concern is small for this purpose if it is primarily engaged in petroleum

refinancing and meets the size standard for a petroleum refining business.

§ 121.512 What is the size standard for stockpile purchases?

A concern is small for this purpose if:

- (a) It is primarily engaged in the purchase of materials which are not domestic products; and
- (b) Its annual receipts, together with its affiliates, do not exceed \$42 million.

Size Eligibility Requirements for the Minority Enterprise Development (MED) Program

§ 121.601 What is a small business for purposes of admission to SBA's Minority Enterprise Development (MED) program?

An applicant must be small under the size standard corresponding to its primary industry classification in order to be admitted to SBA's Minority Enterprise Development (MED) program.

§ 121.602 At what point in time must a MED applicant be small?

A MED applicant must be small for its primary industry at the time SBA certifies it for admission into the program.

§ 121.603 How does SBA determine whether a Participant is small for a particular MED subcontract?

(a) *Self certification by Participant.* A MED Participant must certify that it qualifies as a small business under the SIC code assigned to a particular MED subcontract as part of its initial offer including price to the procuring agency. The Participant also must submit a copy of its offer, including its self-certification as to size, to the appropriate SBA district office at the same time it submits the offer to the procuring agency.

(b) *Verification of size by SBA.* Within 30 days of its receipt of a Participant's size self-certification for a particular MED subcontract, the SBA district office serving the geographic area in which the Participant's principal office is located will review the Participant's self-certification and determine if it is small for purposes of that subcontract. The SBA district office will review the Participant's most recent financial statements and other relevant data and then notify the Participant of its decision.

(c) *Changes in size between date of self-certification and date of award.* (1) Where SBA verifies that the selected Participant is small for a particular procurement, subsequent changes in size up to the date of award, except those due to merger with or acquisition by another business concern, will not

affect the firm's size status for that procurement.

(2) Where a Participant has merged with or been acquired by another business concern between the date of its self-certification and the date of award, the concern must recertify its size status, and SBA must verify the new certification before award can occur.

(d) *Finding Participant to be other than small.* (1) A Participant may request a formal size determination (pursuant to §§ 121.1001–121.1009) with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the Participant is located within 5 working days of its receipt of notice from the SBA district office that it is not small for a particular MED subcontract.

(2) Where the Participant does not timely request a formal size determination, SBA may accept the procurement in support of another Participant, or may rescind its acceptance of the offer for the MED program, as appropriate.

§ 121.604 Are MED Participants considered small for purposes of other SBA assistance?

A concern which SBA determines to be a small business for the award of a MED subcontract will be considered to have met applicable size eligibility requirements of other SBA programs where that assistance directly and primarily relates to the performance of the MED subcontract in question.

Size Eligibility Requirements for the Small Business Innovation Research (SBIR) Program

§ 121.701 What SBIR programs are subject to size determinations?

(a) These sections apply to size status for award of a funding agreement pursuant to the Small Business Innovation Development Act of 1982 (Pub. L. 97–219, 15 U.S.C. 638(e) through (k)).

(b) *Funding agreement officer* means a contracting officer, a grants officer, or a cooperative agreement officer.

(c) *Funding agreement* means any contract, grant or cooperative agreement entered into between any Federal agency and any small business for the performance of experimental, developmental, or research work funded in whole or in part by the Federal Government. Such work includes:

(1) A systematic, intensive study directed toward greater knowledge or understanding of the subject studied;

(2) A systematic study directed specifically toward applying new knowledge to meet a recognized need; or

(3) A systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.

§ 121.702 What size standards are applicable to the SBIR program?

To be eligible to compete for award of funding agreements in SBA's Small Business Innovation Research (SBIR) program, a business concern must:

- (a) Be at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States; and
- (b) Not have more than 500 employees, including its affiliates.

§ 121.703 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions based upon a specific funding agreement, and are binding upon the parties. Other SBA opinions provided to funding agreement officers or others, are only advisory, and are not binding or appealable.

§ 121.704 When does SBA determine the size status of a business concern?

The size status of a concern for the purpose of a funding agreement under the SBIR program is determined as of the date of the award for both Phase I and Phase II SBIR awards.

§ 121.705 Must a business concern self-certify its size status?

(a) A firm must self-certify it is small in its SBIR funding proposal.

(b) A funding agreement officer may accept a concern's self-certification as true for the particular funding agreement involved in the absence of a written protest by other offerors or other credible information which would cause the funding agreement officer or SBA to question the size of the concern.

(c) Procedures for protesting an offeror's self-certification are set forth in §§ 121.1001–121.1009.

Size Eligibility Requirements for Paying Reduced Patent Fees

§ 121.801 May patent fees be reduced if a concern is small?

Sections 121.801–121.805 apply to size status for the purpose of paying reduced patent fees authorized by Pub. L. 97–247. The eligibility requirements for independent inventors and nonprofit organizations for the purpose of paying reduced patent fees are set forth in regulations of the Patent and Trademark Office of the Department of Commerce, 37 CFR 1.9, 1.27, 1.28.

§ 121.802 What size standards are applicable to reduced patent fees programs?

A concern eligible for reduced patent fees is one:

- (a) Whose number of employees, including affiliates, does not exceed 500 persons; and
- (b) Which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this section.

§ 121.803 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions, based upon a specific patent application pursuant to the rules of the Patent and Trademark Office, Department of Commerce, and are binding upon the parties. Other SBA opinions provided to patent applicants or others are only advisory, and are not binding or appealable.

§ 121.804 When does SBA determine the size status of a business concern?

Size status is determined as of the date of the patent applicant's written verification of size.

§ 121.805 May a business concern self-certify its size status?

- (a) A concern verifies its size status with its submission of its patent application.
- (b) Any attempt to establish small size status improperly (fraudulently, through gross negligence, or otherwise) may result in remedial action by the Patent and Trademark Office.
- (c) In the absence of credible information indicating otherwise, the Patent and Trademark Office may accept the verification by the concern as a small business as true.
- (d) Question concerning the size verification are resolved initially by the Patent and Trademark Office. If not verified as small, the applicant may request a formal SBS size determination.

Size Eligibility Requirements for Compliance With Programs of Other Agencies

§ 121.901 Can other Government agencies obtain SBA size determinations?

Upon request by another Government agency, SBA will provide a size determination, under SBA rules, standards and procedures, for its use in determining compliance with small business requirements of its statutes, regulations or programs.

§ 121.902 What size standards are applicable to programs of other agencies?

(a) *SBA size standards.* The size standards for compliance with programs of other agencies are those for SBA programs which are most comparable to the programs of such other agencies, unless otherwise agreed by the agency and SBA.

(b) *Special size standards.* (1) Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria. In limited circumstances, if they decide the SBA size standard is not appropriate, then agency heads may establish a small business definition for the exclusive use of such program which is more appropriate, but only when:

- (i) The size standard is first proposed for public comment pursuant to the Administrative Procedure Act, 4 U.S.C. 553;
 - (ii) The proposed size standard provides for determining size measured by average number of employees over 12 months for manufacturing concerns, average annual revenues over three years for concerns providing services, and data over a period of not less than three years for all other concerns (unless approved by SBA, "annual receipts" and "number of employees" must be determined in accordance with §§ 121.104 and 121.106, respectively); and
 - (iii) The proposed size standard is approved by SBA's Administrator.
- (2) In order to receive the approval of SBA's Administrator, the agency head must:

- (i) Request approval prior to publishing the proposed rule containing the size standard. The request must include: an explanation of the contemplated industry size standard, the reasons the SBA size standard is not appropriate, and the reasons the proposed size standard would be appropriate; and a certification that there will be compliance with the criteria set forth in paragraphs (b)(1)(i) and (b)(1)(ii) of this section; and
- (ii) Agree to provide written notice to SBA's Administrator prior to publishing the contemplated size standard as a final rule. The notice must include: a copy of the intended final rule, including the preamble, or a separate written justification for the intended size standard followed by a copy of the intended final rule and preamble prior to its publication; copies of all public comments relating to the size standards received in response to the proposed rule; and any other supporting documentation relevant to the size standard and requested by SBA's Administrator.

(3) When approving any size standard established pursuant to paragraph (b) of this section, SBA's Administrator will ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries, and consider other relevant factors.

(4) Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA's which is more appropriate for such analysis.

§ 121.903 When does SBA determine the size status of a business concern?

For the purpose of compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

Procedures for Size Protests and Requests for Formal Size Determinations

§ 121.1001 Who may initiate a size protest or a request for formal size determination?

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, the following entities may file a size protest in connection with a particular procurement or sale:

- (i) Any offeror;
- (ii) The contracting officer;
- (iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, or the Associate Administrator for Government Contracting; and

(iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

(2) For SBA's Subcontracting Program, the following entities may protest:

- (i) The prime contractor;
- (ii) The contracting officer;
- (iii) Other potential subcontractors;
- (iv) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting; and
- (v) Other interested parties.

(3) For SBA's Small Business Innovation Research (SBIR) Program, the following entities may protest:

- (i) A prospective offeror;
- (ii) The funding agreement officer;
- (iii) The responsible SBA Government Contracting Area Director or the Assistant Administrator for Technology; and

(iv) Other interested parties.

(4) For the Department of Defense's Small Disadvantaged Business (SDB) Program, and any other similar program of another Federal agency, the following entities may file a protest in connection with a particular SDB procurement:

- (i) Any offeror for the specific SDB requirement;
- (ii) The contracting officer; and
- (iii) The responsible SBA Government Contracting Area Director, the Associate Administrator for Government Contracting, or the Associate Administrator for MED.

(5) For any unrestricted Government procurement in which status as a small business may be beneficial, including, but not limited to, the award of a contract to a small business where there are tie bids, the opportunity to seek a Certificate of Competency by a small business, and SDB price evaluation preferences, the following entities may protest in connection with a particular procurement:

- (i) Any offeror;
- (ii) The contracting officer; and
- (iii) The responsible SBA Government Contracting Area Director, the Associate Administrator for Government Contracting, or the Associate Administrator for MED.

(b) *Request for Size Determinations.*

(1) For SBA's Financial Assistance Programs, the following entities may request a formal size determination:

- (i) The applicant for assistance; and
- (ii) The SBA official with authority to take final action on the assistance requested.

(2) For SBA's MED program—

(i) Concerning initial MED eligibility, the following entities may request a formal size determination:

- (A) The MED applicant concern; and
- (B) The Director of the Division of Program Certification and Eligibility or the Associate Administrator for MED.

(ii) Concerning individual 8(a) subcontract awards, whether sole source or competitive, the following entities may request a formal size determination:

(A) The MED concern nominated by SBA for the particular sole source 8(a) award or the apparent successful offeror for the particular competitive 8(a) award;

(B) The SBA program official with authority to execute the 8(a) subcontract; and

(C) The SBA District Director in the district serving the area in which the headquarters of the MED concern is located, regardless of the location of a parent company and affiliates, or the Associate Administrator for MED.

(3) For SBA's Certificate of Competency Program, the following entities may request a formal size determination:

- (i) The offeror who has applied for a COC; and
- (ii) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting.

(4) For SBA's sale or lease of government property, the following entities may request a formal size determination:

- (i) The responsible SBA Government Contracting Area Director or the Associate Administrator for Government Contracting; and
- (ii) Authorized officials of other Federal agencies administering a property sales program.

(5) For eligibility to pay reduced patent fees, the following entities may request a formal size determination:

- (i) The applicant for the reduced patent fees; and
- (ii) The Patent and Trademark Office.

(6) For purposes of determining compliance with small business requirements of another Government agency program not otherwise specified in this section, an official with authority to administer the program involved may request a formal size determination.

§ 121.1002 Who makes a formal size determination?

The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination, with the exception of size determinations for purposes of the Disaster Loan Program, which will be made by the Disaster Area Office Director or designee responsible for the area in which the disaster occurred.

§ 121.1003 Where should a size protest be filed?

A protest involving a government procurement or sale must be filed with the contracting officer for the procurement or sale, who must forward the protest to the SBA Government Contracting Area Office serving the area in which the headquarters of the protested concern is located, regardless of the location of any parent company or affiliates.

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA*—(1) *Non-negotiated procurement or sale.* A protest must be received by the contracting officer prior to the close of the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening.

(2) *Negotiated procurement.* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.

(3) *Multiple award schedule.* On a multiple award schedule procurement set aside for small business, protests will be considered timely if received by SBA at any time prior to the expiration of the contract period (including renewals).

(b) *Protests by contracting officers or SBA.* The time limitations in paragraph (a) of this section do not apply to contracting officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (e) of this section.

(c) *Effect of contract award.* A timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest.

(d) *Untimely protests.* A protest received after the allotted time limits must still be forwarded to SBA. SBA will dismiss untimely protests.

(e) *Premature protests.* A protest filed by any party, including the contracting officer, before bid opening or notification to offerors of the selection of the apparent successful offer will be dismissed as premature.

§ 121.1005 How must a protest be filed with the contracting officer?

A protest must be delivered to the contracting officer by hand, telegram, mail, FAX, or telephone. If a protest is made by telephone, the contracting officer must later receive a confirming letter either within the 5-day period in § 121.1004 (b)(1) or postmarked no later than one day after the date of the telephone protest.

§ 121.1006 When will a size protest be referred to an SBA Government Contracting Area Office?

(a) A contracting officer who receives a protest (other than from SBA) must forward the protest promptly to the SBA Government Contracting Area Office serving the area in which the headquarters of the offeror is located.

(b) A contracting officer's referral must contain the following information:

- (1) The protest and any accompanying materials;
- (2) A copy of the self-certification as to size;
- (3) Identification of the applicable size standard;
- (4) A copy of the solicitation;
- (5) Identification of the date of bid opening or notification provided to unsuccessful offerors;
- (6) The date on which the protest was received; and
- (7) A complete address and point of contact for the protested concern.

§ 121.1007 Must a protest of size status relate to a particular procurement and be specific?

(a) *Particular procurement.* A protest challenging the size of a concern which does not pertain to a particular procurement or sale will not be acted on by SBA.

(b) *A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

(c) *Non-specific protests will be dismissed.* Protests which do not contain sufficient specificity will be dismissed by SBA.

§ 121.1008 What happens after SBA receives a size protest or a request for a formal size determination?

(a) When a size protest is received, the SBA Government Contracting Area Director, or designee, will promptly notify the contracting officer, the protested concern, and the protestor that a protest has been received. In the event the size protest pertains to a requirement involving SBA's SBIR Program, the Government Contracting Area Director will advise the Assistant Administrator for Technology of the receipt of the protest. SBA will provide a copy of the protest to the protested concern along with a blank SBA Application for Small Business Size Determination (SBA Form 355) by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt. SBA will ask the protested concern to respond to the allegations of the protestor.

(b) When SBA receives a request for a formal size determination in accord with § 121.1001(b), SBA will provide a blank copy of SBA Form 355 to the concern whose size is at issue.

(c) The protested concern or concern whose size is at issue must return the completed SBA Form 355 and all other requested information to SBA within 3 working days from the date of receipt of the blank form from SBA. SBA has discretion to grant an extension of time to file the form. The firm must attach to the completed SBA Form 355 its answers to the allegations contained in the protest, where applicable, together with any supporting material.

(d) If a concern does not submit a completed SBA Form 355, answers to the protest allegations, or other requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the form, any information missing from it, or other missing information would show or tend to show that the concern is other than a small business.

§ 121.1009 What are the procedures for making the size determination?

(a) *Time frame for making size determination.* After receipt of a protest or a request for a formal size determination, SBA will make a formal size determination within 10 working days, if possible.

(b) *Basis for determination.* The size determination will be based primarily on information supplied by the protestor or the entity requesting the size determination and the subject concern. The determination, however, may also be based on other grounds not raised in the protest or request for size determination. SBA may utilize other information in its files and may make inquiries including requests to the protestor, the protested concern and any alleged affiliates, or other persons for additional specific information.

(d) *Burden of persuasion.* The concern whose size is under consideration has the burden of establishing its small business size.

(e) *Weight of evidence.* SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

(f) *Formal size determination.* The SBA will base its formal size determination upon the record, including reasonable inferences from

the record, and will state in writing the basis for its findings and conclusions.

(g) *Notification of determination.* SBA will promptly notify the contracting officer, the protestor, and the protested offeror, as well as each affiliate or alleged affiliate, of the size determination. The notification will be by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt.

(h) *Results of an SBA size determination.* (1) A formal size determination becomes effective immediately and remains in full force and effect unless and until reversed by OHA, or unless the concern is formally recertified as a small business by SBA.

(2) Once SBA has determined that a concern is other than small for purposes of a particular procurement, the concern cannot later become eligible for the procurement by reducing its size.

(3) A concern determined to be other than small for a particular size standard is ineligible for any procurement or assistance authorized by the Small Business Act or the Small Business Investment Act of 1958, requiring the same or a lower size standard, unless recertified as small pursuant to § 121.1010. Following an adverse size determination, a concern cannot again self-certify as small within the same or a lower size standard unless it is recertified as small by SBA. If it does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as small on a pending procurement or on another assistance application, the concern must immediately inform the officials responsible for the pending procurement or other requested assistance of the adverse size determination.

(i) *Limited reopening of size determinations.* In cases where the size determination contains clear administrative error or a clear mistake of fact, the SBA office that made the size determination may, in its sole discretion, reopen the size determination to correct the error or mistake, provided the case has not been accepted for review by OHA.

§ 121.1010 How does a concern become recertified as a small business?

(a) A concern may request SBA to recertify it as small at any time by filing an application for recertification with the Government Contracting Area Office responsible for the area in which the headquarters of the applicant is located, regardless of the location of parent companies or affiliates. No particular form is prescribed for the application;

however, the request for recertification must be accompanied by a current completed SBA Form 355 and any other information sufficient to show a significant change in its ownership, management, or other factors bearing on its status as a small concern.

(b) Recertification will not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation due to a joint venture (e.g., ostensible subcontracting) limited to a particular Government procurement or property sale, or is based on an ineligible manufacturer where the eligible small business bidder or offeror is a nonmanufacturer on a particular Government procurement.

(c) A denial of an application for recertification is a formal size determination and may be reviewed by OHA at the discretion of that office.

(d) The granting of an application for recertification has future effect only. While it is a formal size determination, notice of recertification is required to be given only to the applicant.

Appeals of Size Determinations and SIC Code Designations

§ 121.1101 Are formal size determinations subject to appeal?

There is no right of appeal of a size determination. OHA, however, may, in its sole discretion, review a formal size determination made by a SBA Government Contracting Area Office or by a Disaster Area Office. Unless OHA accepts a petition for review of a formal size determination, the size determination made by a SBA Government Contracting Area Office or by a Disaster Area Office is the final decision of SBA. The procedures for requesting discretionary reviews by OHA of formal size determinations are set forth in part 134 of this chapter.

§ 121.1102 Are SIC code designations subject to appeal?

Appeals may be made to OHA, which has exclusive jurisdiction to determine appeals of SIC code designations pursuant to part 134 of this chapter.

§ 121.1103 What are the procedures for appealing a SIC code designation?

(a) Generally, any interested party who has been adversely affected by a SIC code designation may appeal the designation to OHA. However, with respect to a particular MED contract, only the Associate Administrator for MED may appeal.

(b) Procedures for perfecting SIC code appeals with OHA are contained in § 19.303 of the Federal Acquisition Regulations, 48 CFR 19.303.

Subpart B—Other Eligibility Provisions

Eligibility of Organizations for the Handicapped for Small Business Set-asides

§ 121.1201 May handicapped organizations be awarded Federal procurements set aside for small business?

Section 15 of the Small Business Act, 15 U.S.C. 644(c), provides that public or private organizations for the handicapped are eligible to participate in Federal procurements which are set aside for small business.

§ 121.1202 What is an organization for the handicapped?

An organization for the handicapped means a public or private entity:

(a) Which is organized under the laws of the United States or any state and operated in the interest of handicapped individuals, the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual; and

(b) Which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor.

§ 121.1203 Who are handicapped individuals?

A handicapped individual means a person who has a physical, mental, or emotional impairment, defect, ailment, disease, or disability of a permanent nature which in any way limits the selection of any type of employment for which the person would otherwise be qualified or qualifiable.

§ 121.1204 What are the eligibility requirements for organizations for the handicapped to receive awards of contracts set aside for small business?

Organizations for the handicapped are eligible if at least 75 percent of the direct labor performed on each item being produced under the contract, or performed in providing each type of service under the contract, is performed by handicapped individuals, and the statutory maximum allowable amount of such awards for the applicable fiscal year has not been reached.

§ 121.1205 What are the procedures for filing protests of the status of handicapped organizations?

(a) *Who may protest.* A responsive offeror, the affected contracting officer, or SBA may file a protest.

(b) *Procedure to protest and time frame.* A protest must be delivered to the contracting officer by hand, telegram, or be placed in the U.S. mail prior to the close of business on the fifth working day after bid opening, or, in the case of a negotiated procurement, the

fifth working day after receipt of notification of the identity of the apparent successful offeror.

(c) *Protest must be specific.* Protests must allege specific information tending to show that the protested organization does not meet the eligibility criteria.

(d) *Receipt of protest by SBA from contracting officer.* The contracting officer who received the protest must promptly forward it to the Associate Administrator for Government Contracting, Small Business Administration, 409 Third Street, S.W., Washington, D.C. 20416.

(e) *Notice to the protested organization.* SBA will notify the protested organization in writing of the protest and request documentation addressing the allegations supporting the protest.

(f) *Required response from protested organization.* Within three business days of receipt of written notification of the protest from SBA, the protested organization must provide SBA with required documentation, including any other documentation or information it wishes SBA to consider. Failure to submit required documentation may be grounds for a finding against the protested organization.

(1) Except as provided in paragraph (f)(2) of this section, the following documentation, where applicable, must be provided to SBA in order to demonstrate the eligibility of an organization:

(i) A copy of the articles of incorporation of the protested organization showing the date of filing and the signature of an appropriate State official.

(ii) A copy of the bylaws of the protested organization.

(iii) If the articles of incorporation or bylaws do not include a statement to the effect that no part of its net income may inure to the benefit of any shareholder or other individual, one of the following documents:

(A) A certified copy of the State statute under which the organization was incorporated which includes wording to the effect that no part of its net income may inure to the benefit of any shareholder or other individual;

(B) A copy of a resolution approved by the governing body of the corporation, certified by an officer of the corporation, to the effect that no part of its net income may inure to the benefit of any shareholder or other individual; or

(C) A copy of the Internal Revenue Service certificate, duly executed during the prior twelve months, indicating that the corporation has been accepted as a non-profit agency for taxation purposes.

(2) A State-owned or State-operated workshop for the blind or other severely handicapped shall demonstrate its eligibility by submitting the following documents:

(i) A certified copy of the State statute establishing or authorizing the establishment of a workshop for the handicapped; and

(ii) In the case of a wholly-owned State corporation, a certified copy of the corporate bylaws; and, in the case of a State agency, a certified true copy of implementing regulations, operating procedures, notice of establishment of the workshop, or other similar documents.

(3) If the protested organization is a workshop participating under the Javits-Wagner-O'Day Program, the required documentation may be delivered by the Committee for Purchase from the Blind and Other Severely Handicapped which maintains workshop eligibility documentation on file in its offices. Delivery may be made by hand, telegram or placement in the U.S. Postal Service.

(g) *Required consultation.* The Associate Administrator for Government Contracting will consult with the Executive Director of the Committee for Purchase from the Blind and other Severely Handicapped before rendering a determination.

(h) *Notice of decision.* SBA shall, within ten business days of receipt of a protest, notify all parties of its decision. Notification will be considered complete upon hand delivery, receipt of a telegram, or placement in the U.S. Postal Service.

(i) *Final SBA decision.* The Associate Administrator for Government Contracting makes the final Agency decision.

§ 121.1206 How does SBA handle appeals of economic impact?

A proposed award of a small business set-aside to an organization for the handicapped may be appealed to SBA if a small business concern has experienced or is likely to experience severe economic injury as the result of the proposed award.

(a) *Who may appeal.* An appeal may be filed by a small business concern making an offer on the solicitation which:

(1) Is or was the incumbent contractor on a predecessor contract for the services or products being solicited; or

(2) Was the apparent otherwise successful offeror on a prior small business set-aside contract that was awarded to an organization for the handicapped.

(b) *Grounds for appeal.* (1) An incumbent contractor must show that:

(i) Absent competition by organizations for the handicapped, it is likely to receive the instant award; and

(ii) The dollar amount of the instant award represents at least 25 percent of the concern's annual receipts in its most recently completed fiscal year.

(2) Offerors appealing on the grounds of prior small business set-aside contract awards to organizations for the handicapped must show that:

(i) Absent competition by organizations for the handicapped, it is likely to receive the instant award;

(ii) The dollar amount of the instant award represents at least 25 percent of the concern's annual receipts in its most recently completed fiscal year; and

(iii) The dollar amount of the prior small business set-aside contract awarded to an organization for the handicapped for which the concern was the apparent otherwise successful offeror represented at least 25 percent of its annual receipts for the fiscal year in which the contract was awarded. If the fiscal year in which the prior contract was awarded to an organization for the handicapped is not yet completed, the award must represent at least 25 percent of the concern's most recently completed fiscal year.

(c) *Procedure for appeal.* (1) Appeals must be submitted to the contracting officer who must promptly forward them to the Associate Administrator for Government Contracting, Small Business Administration, 409 3rd Street, S.W., Washington, D.C. 20416. The Associate Administrator makes the final Agency decision.

(2) Appeals must be delivered by hand, telegraph, or placed in the United States mail, by the close of business of the tenth calendar day after opening of bids or, in the case of negotiated procurements, after receipt of notification of the identity of the apparent successful offeror.

(3) The Associate Administrator will consult with the Executive Director of the Committee for Purchase from the Blind and Other Severely Handicapped and will decide the appeal within ten working days after its receipt.

(4) The Associate Administrator will notify the appellant and contracting officer of SBA's decision and require the contracting officer to proceed with award or to make an award without regard to offers by organizations for the handicapped.

Waivers of the Nonmanufacturer Rule for Classes of Products

§ 121.1301 What is the Nonmanufacturer Rule?

The Nonmanufacturer Rule is set forth in § 121.406(b).

§ 121.1302 When will a waiver of the Nonmanufacturer Rule be granted for a class of products?

(a) A waiver for a class of products (class waiver) will be granted when there are no small business manufacturers or processors available to participate in the Federal market for that class of products.

(b) *Federal market* means acquisitions by the Federal Government from offerors located in the United States, or such smaller area as SBA designates if it concludes that the class of products is not supplied on a national basis.

(1) When considering the appropriate market area for a product, SBA presumes that the entire United States is the relevant Federal market, unless it is clearly demonstrated that a class of products cannot be procured on a national basis. This presumption may be particularly difficult to overcome in the case of manufactured products, since such items typically have a market area encompassing the entire United States.

(2) When considering geographic segmentation of a Federal market, SBA will not necessarily use market definitions dependent on airline radius, political, or SBA regional boundaries. Market areas typically follow established transportation routes rather than jurisdictional borders. SBA examines the following factors, among others, in cases where geographic segmentation for a class of products is urged:

(i) Whether perishability affects the area in which the product can practically be sold;

(ii) Whether transportation costs are high as a proportion of the total value of the product so as to limit the economic distribution of the product;

(iii) Whether there are legal barriers to transportation of the item;

(iv) Whether a fixed, well-delineated boundary exists for the purported market area and whether this boundary has been stable over time; and

(v) Whether a small business, not currently selling in the defined market area, could potentially enter the market from another area and supply the market at a reasonable price.

(c) *Available to participate* in the context of the Federal market means that contractors exist that have been awarded or have performed a contract to supply a specific class of products to the

Federal Government within 24 months from the date of the request for waiver, either directly or through a dealer, or who have submitted an offer on a solicitation for that class of products within that time frame.

(d) *Class of products* is an individual subdivision within a four-digit Industry Number as established by the Office of Management and Budget in the SIC Manual.

§ 121.1303 When will a waiver of the Nonmanufacturer Rule be granted for an individual contract?

An individual waiver for a product in a specific solicitation will be approved when the SBA Associate Administrator for Government Contracting reviews and accepts a contracting officer's determination that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of a solicitation, including the period of performance.

§ 121.1304 What are the procedures for requesting and granting waivers?

(a) *Waivers for classes of products.* (1) SBA may, at its own initiative, examine a class of products for possible waiver of the Nonmanufacturer Rule.

(2) 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 or hand-carried to the Associate Administrator of Government Contracting, Small Business Administration, 409 3rd Street S.W., Washington, D.C.

(3) Requests for a waiver of a class of products need not be in any particular form, but should include a statement of the class of products to be waived, the applicable SIC code, and detailed information on the efforts made to identify small business manufacturers or processors for the class.

(4) 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 Nonmanufacturer Rule 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 Nonmanufacturer Rule for that class of products has been granted.

(5) An expedited procedure for issuing a class waiver may be used for emergency situations, but only if the contracting officer provides a determination to the Associate Administrator for Government Contracting that the procurement is proceeding under the authority of FAR (48 CFR 6.302-2 for "unusual and compelling urgency," or provides a determination materially the same as one of unusual and compelling urgency. Under the expedited procedure, if a small business manufacturer or processor is not identified by a PASS search, the SBA will grant the waiver for the class of products and then publish a notice in the Federal Register. The notice will state that a waiver has been granted, and solicit public comment for future procurements.

(6) The decision by the Associate Administrator for Government Contracting to grant or deny a waiver is the final decision by the Agency.

(7) A waiver of the Nonmanufacturer Rule for classes of products has no specific time limitation. SBA will, however, periodically review existing class waivers to the Nonmanufacturer Rule to determine if small business manufacturers or processors have become available to participate in the Federal market for the waived classes of products and the waiver should be terminated.

(i) Upon SBA's receipt of evidence that a small business manufacturer or processor exists in the Federal market for a waived class of products, the waiver will be terminated by the Associate Administrator for Government Contracting. This evidence may be discovered by SBA during a periodic review of existing waivers or may be brought to SBA's attention by other sources.

(ii) SBA will announce its intent to terminate a waiver for a class of products through the publication of a notice in the Federal Register, asking for comments regarding the proposed termination.

(iii) Unless public comment reveals that no small business manufacturer or process in fact exists for the class of products in question, SBA will publish a final Notice of Termination in the Federal Register.

(b) *Individual waivers for specific solicitations.* (1) A contracting officer's request for a waiver of the Nonmanufacturer Rule for specific solicitations need not be in any

particular form, but must, at a minimum, include:

(i) A definitive statement of the specific item to be waived and justification as to why the specific item is required;

(ii) The solicitation number, SIC code, dollar amount of the procurement, and a brief statement of the procurement history;

(iii) A determination by the contracting officer that there are no known small business manufacturers or processors for the requested items (the determination must contain a narrative statement of the contracting officer's efforts to search for small business manufacturers or processors of the item and the results of those efforts, and a statement by the contracting officer that there are no known small business manufacturers for the items and that no small business manufacturer or processor can reasonably be expected to offer the required items); and

(iv) For contracts expected to exceed \$500,000, a copy of the Statement of Work.

(2) Requests should be addressed to the Associate Administrator for Government Contracting, Small Business Administration, 409 3rd Street, S.W., Washington, D.C. 20416.

(3) SBA will examine the contracting officer's determination and any other information it deems necessary to make an informed decision on the individual waiver request. If SBA's research verifies that no small business manufacturers or processors exist for the item, the Associate Administrator for Government Contracting will grant an individual, one-time waiver. If a small business manufacturer or processor is found for the product in question, the Associate Administrator will deny the request. Either decision represents a final decision by SBA.

§ 121.1305 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers of the Nonmanufacturer Rule have been granted will be maintained in SBA's Procurement Automated Source System (PASS). A list of such waivers may also be obtained by contacting the Office of Government Contracting at the Small Business Administration, Washington, D.C. 20416, or at the nearest SBA Government Contracting Area Office.

Dated: November 11, 1995.

Philip Lader,
Administrator.

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