

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 121

RIN 3245-AE84

#### Small Business Size Regulations; Petroleum Refineries

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

**ACTION:** Proposed rule.

**SUMMARY:** The Small Business Administration (SBA) proposes to modify the small business size standard for petroleum refiners for purposes of Federal Government procurement. SBA proposes to increase the capacity component of the size standard from 75,000 barrels per day (bpd) to 155,000 barrels per calendar day (bpcd); to define the capacity measure in bpcd; and to measure a refiner's total Operable Atmospheric Crude Oil Distillation Capacity. The proposed revision is a better definition of the size of business in this industry that SBA believes should be eligible as small refiners for Federal procurement programs.

**DATES:** SBA must receive comments on or before March 14, 2002. SBA will make all public comments available to any person or concern upon request.

**ADDRESSES:** Address all comments concerning this proposed rule to Gary M. Jackson, Assistant Administrator for Size Standards, Office of Size Standards, 409 3rd Street, SW., Washington, DC 20416, or via e-mail to [sizestandards@sba.gov](mailto:sizestandards@sba.gov).

**FOR FURTHER INFORMATION CONTACT:** Carl Jordan, Office of Size Standards, at (202) 205-6618. You may also e-mail [sizestandards@sba.gov](mailto:sizestandards@sba.gov).

#### SUPPLEMENTARY INFORMATION:

##### Introduction

SBA proposes to modify the small business size standard for Petroleum Refineries (North American Industry Classification System [NAICS] 324110) for purposes of Federal Government procurement. SBA proposes (1) to increase the capacity component of the

standard from 75,000 barrels per day (bpd) to 155,000 barrels per calendar day (bpcd); (2) to clarify that the capacity component is measured in bpcd as defined by the U. S. Department of Energy, Energy Information Administration (EIA), rather than bpd; and (3) to clarify that the capacity component is a measure of a refiner's total Operable Atmospheric Crude Oil Distillation Capacity, as used by EIA.

The current small business size standard for NAICS 324110, Petroleum Refineries (formerly Standard Industrial Classification [SIC] 2911, Petroleum Refining), is 1,500 employees.<sup>1</sup> The 1,500 employee size standard applies to all Federal Government programs that provide benefits to concerns that qualify as a small business concern. SBA does not propose to modify the 1,500 employee size standard.

For purposes of Federal Government procurement, to qualify as a small business, there is an additional size standard component that specifies the maximum refining capacity of a small business. Footnote 4 to the Table of Small Business Size Standards (13 CFR 121.201) states:

NAICS code 324110—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.

SBA received a request from a small petroleum refiner to delete the bpd part of the size standard for Petroleum Refineries. The requestor has two

<sup>1</sup> Effective January 1, 1997, the Federal Government, for statistical purposes, replaced the SIC system with NAICS. For purposes of small business size standards, SBA adopted the definitions of NAICS for all industries effective October 1, 2000. NAICS is a new statistical system, and there were changes to the descriptions of many industry structures in the shift from SIC to NAICS. According to *North American Industry Classification System United States, 1997*, the entire SIC 2911 is related to NAICS 324110. NAICS 324110 "comprises establishments primarily engaged in refining crude petroleum into refined petroleum. Petroleum refining involves one or more of the following activities: (1) Fractionation; (2) straight distillation of crude oil; and (3) cracking." The size standard for NAICS 324110, Petroleum Refineries, remains the same as it was for SIC 2911, Petroleum Refining.

concerns. First, the requestor is concerned about the apparent domination of the refining industry by large refiners. Over the past ten years, larger refiners have merged with and acquired other concerns, both large and small, and formed large joint ventures. The requestor complained that under the current 75,000 bpd size standard, many smaller refiners cannot grow, merge with or acquire other refiners without losing their small business status. In the event a small refiner does so, and thereby loses its small business status, it will remain very small compared to larger refiners. Without the opportunity to participate in Federal Government procurement as small businesses, it would still be too small to compete successfully for larger Federal contracts in the open market.

Second, the requestor is concerned about the decline in small refiners' share of the U.S. total refining capacity. The requestor states that small refiners' share of the total U.S. capacity has declined from 7.8 percent in 1975, to 7.1 percent in 1984, to 6.7 percent in 1990, and to 4.1 percent in 1999. In twenty-four years, this is a decline of almost 50 percent.

Based on these concerns, SBA believes it should re-evaluate the capacity component of the Petroleum Refineries size standard as the small petroleum refiner requested. However, it does not agree that the refining capacity component should be eliminated from the size standard for Federal Government procurement. When SBA had proposed eliminating this component in 1991, comments strongly favored retaining it. Those commenters stated that there is no meaningful relationship between barrel capacity and the number of refinery employees. Thus, they claimed, eliminating the bpd requirement would not accurately reflect a small petroleum refiner. This was due to varying degrees of automation among refineries as well as the extent to which firms are engaged in non-refining activities. Based on SBA's industry analysis for this proposed rule, SBA believes that this remains the general opinion of most refiners.

Furthermore, refinery capacity is a standard reference for measuring refiners among one another, and it is a measure that is unique to the refining industry. EIA has used this measure for many years, and SBA believes it

continues to be a useful and relevant size standard component for Federal procurement purposes. The 1,500 employee size standard applies to refiners for all other programs, but refinery capacity is directly related to refiners' ability to respond to Federal procurement of their petroleum products. Regardless of a refiner's number of employees, SBA does not believe that to qualify as a small refiner competing against other small refiners for Federal petroleum contracts that there should be no limit to its refining capacity.

### History of the Size Standard

SBA first established a small business size standard for Federal Government procurement of petroleum products in 1955. The size standard was 1,000 employees with a refining capacity not to exceed 30,000 bpd. With this size standard, small businesses accounted for 7.8 percent of the total U.S. refining capacity. By 1975, this small business share of total capacity had fallen to 5.1 percent. Therefore, SBA increased the size standard to 1,500 employees with a 50,000 bpd capacity. This restored small business share to 7.8 percent of total U.S. capacity. By 1990, however, the small business share had again declined, to 6.7 percent of the total U.S. refining capacity.

On May 3, 1991, SBA proposed in the **Federal Register** to eliminate the 50,000 bpd component of the size standard entirely (56 FR 20832). SBA intended to simplify the size standard and make it the same as the single size criterion used for other industries and for other Federal Government programs. SBA believed that this would allow refining concerns that were slightly below the capacity limit to expand their refining facilities without losing their small business status. SBA received 24 comments to this proposal, 22 of which argued to retain the bpd component.

Therefore, on January 7, 1992, SBA proposed in the **Federal Register** (57 FR 541) to increase the bpd component from 50,000 bpd to 75,000 bpd. SBA received comments to this proposal that were mixed on the question of whether or not to increase the bpd component.

On May 1, 1992, SBA published in the **Federal Register** (57 FR 18808) its final rule adopting the 75,000 bpd component of the size standard. SBA did not change the 1,500 employee size standard. SBA has not changed or proposed to change the petroleum refiner size standard since then.

### Size Standards Methodology

Congress grants SBA discretion on how to establish detailed small business

size standards. The Agency's Standard Operating Procedure (SOP) 90 01 3, "Size Determination Program," available on SBA's website at <http://www.sba.gov/library/soproom.html>, sets out four evaluation factors for establishing size standards:

1. Industry structure and economic characteristics;
2. The impact of different size standards on SBA programs and their objectives;
3. Whether a size standard excludes businesses that are dominant in the industry; and,
4. Other factors that SBA determines may also apply.

SBA's research, public comments, industry uniqueness, or how or to what program(s) the size standard applies may require SBA to consider special factors or to modify how it generally assesses a particular size standard, but that is not the norm. If SBA does modify its methodology, it explains both the general methodology and how SBA assessed the size standard for the case at hand. SBA applies no formulas or weighting to the industry factors it analyzes. Below SBA explains how it analyzes the economic characteristics of an industry, the impact of a size standard on SBA programs, and how it evaluates whether a concern at or below a size standard could be considered dominant in the industry under review.

### Industry Analysis

The Small Business Act requires that size standards vary by industry to the extent necessary to reflect differing industry characteristics (U.S.C. 632(a)(3)). Two "anchor size standards" apply to most industries—500 employees for manufacturing industries and \$5 million for nonmanufacturing industries. Anchor size standards are presumed appropriate for an industry unless larger concerns are much more significant within that industry than the "typical industry."

Since this rule is evaluating the capacity component of the Petroleum Refineries size standard, SBA cannot compare it to any other industry. The industry analysis will evaluate changes in the Petroleum Refineries industry over the last 10 years and their implications for the current 75,000 bpd size standard. SBA's analysis assesses data on the characteristics of the sixty-five refiners listed in *Petroleum Supply Annual 2000*, Volume 1, Table 40, published by EIA. The *Petroleum Supply Annual 2000* is available on EIA's website, <http://www.eia.doe.gov/>. Table 40 ranks refiners by their total Operable Crude Oil Distillation Capacity, as of January 1, 2001.

Virtually all data used to compare the relative sizes of refiners reflect refiners' capacity. The analysis will consist of the same factors as other size standard analyses.

In 13 CFR 121.102 (a) and (b), SBA lists the primary evaluation factors that describe the structural characteristics of an industry—average concern size, distribution of concerns by size, start-up costs and industry competition. SBA also analyzes the possible impact of a size standard revision on SBA programs. These five factors are the most important ones that SBA evaluates when establishing a size standard. However, SBA will also consider and evaluate other information that is relevant to determining a size standard for a particular industry. Public comments to proposed size standards are also an important source of additional information that SBA closely reviews before making a final decision on a size standard. Below is a brief description of each of the five evaluation factors.

1. *Average concern size.* This is generally the total industry receipts, number of employees, or other measure of size divided by the number of concerns in the industry. The higher the average concern size the higher size standard that can be supported for the industry. For this proposed rule SBA has determined the average sized refiner from Table 40, "Refiners' Operable Atmospheric Crude Oil Distillation Capacity as of January 1, 2001," from *Petroleum Supply Annual 2000*, Volume 1, published by EIA.

2. *Distribution of concerns by size.* SBA usually examines the proportion of industry receipts, employment or other economic activity accounted for by concerns of different sizes in an industry. If the preponderance of an industry's economic activity is by smaller concerns, this tends to support adopting the anchor size standard. The opposite is the case for an industry in which the distribution of concerns indicates that economic activity is concentrated among the largest concerns in an industry. In this rule SBA compares the size of refiners based on their total petroleum refining capacity. To demonstrate industry changes from when SBA last changed this size standard in 1992, SBA also compares current data on the distribution of refiners by size with data from 1989 and 1990.

3. *Start-up costs.* These affect a concern's initial size because entrants to an industry must have sufficient capital to start and maintain a viable business. To the extent that concerns entering an industry have greater financial

requirements than concerns in other industries, SBA considers a higher size standard. The requestor has stated that the bpd capacity constrains small refiners' growth and expansion. In this rule, rather than looking at refinery start-up costs, SBA considers refiners' ability to consolidate their resources. This proposed rule, if adopted, should assist them in expanding their resources, because they will be able to share and thereby reduce the concomitant capital costs of expansion.

4. *Industry competition.* SBA normally assesses this by measuring the proportion or share of industry receipts obtained by concerns that are among the largest concerns in an industry. In this proposed rule, SBA compared the total capacity of the four and the eight largest refiners. These comparisons are generally referred to as "four-firm" and "eight-firm" concentration ratios. When a significant proportion of economic activity within the industry is concentrated among a few relatively

large producers, SBA tends to set a higher size standard.

5. *Competition for Federal procurements and SBA Financial Assistance.* SBA evaluates the possible impact of a size standard on its programs to determine whether small businesses defined under the existing size standard are receiving a reasonable level of assistance. This assessment most often focuses on the proportion or share of Federal contract dollars awarded to small businesses in the industry in question. In general, the lower the share of Federal contract dollars awarded to small businesses in an industry which receives significant Federal procurement revenues, the greater is the justification for a size standard higher than the existing one.

SBA usually assesses the impact of a proposed size standard on other SBA programs to determine whether the current size standard may restrict the level of financial assistance to concerns in that industry. The bpd capacity limit that this proposed rule addresses

applies only to the Federal Government's procurement of petroleum products. Therefore, this proposed change, if adopted in final form, will have no effect on SBA financial assistance or other programs.

#### Average Size Refiner and Refinery

Based on data published by EIA from 1990 to 2000, there was a marked increase in the average refiner size, from 144,185 bpcd to 254,029 bpcd (see Table 1, below). Similarly, average refinery size also increased significantly between these years, from 75,961 bpcd to 104,506 bpcd. These changes reflect both fewer refineries and fewer refiners at the end of 2000 than in 1990 while total combined capacity has increased. Over the last 10 years, mergers, acquisitions, joint ventures, and shutdowns of refineries have resulted in fewer refiners. The increases in average refinery and refiner size support an increase to the current refinery capacity component of the size standard.

TABLE 1

	1990	2001	Percent change
Number of Refiners .....	108	65	(40.0)
Number of Operable Refineries .....	205	158	(22.9)
Total U.S. Capacity (bpcd) .....	15,571,966	16,511,871	6.0
Average capacity per refiner (bpcd) .....	144,185	254,029	76.2
Average capacity per refinery (bpcd) .....	75,961	104,506	37.5

Source: EIA, *Annual Energy Review*, Table 5.9, "Refinery Capacity and Utilization, 1949–2000."

Note: Table 1 data, and all further data in this proposed rule, are based on and refer to "barrels per calendar day" (bpcd), as EIA defines the term, rather than "bpd," as used in SBA's existing size standard.

#### Distribution of Refiners and Refineries by Size

The distribution of refiners by capacity since the last change to the size standard shows a significant trend towards larger refiners in the industry. Table 2, below, compares end of 1989 data used in the 1992 size standard change with data as of January 1, 2001.

TABLE 2

Bpcd	Number of refiners		Number of refineries		Percent of total U.S. capacity	
	1989	2001	1989	2001	1989	2001
>1,000,000 .....	3	4	22	29	24.7	34.9
500,001–1,000,000 .....	6	9	29	42	27.7	36.7
200,001–500,000 .....	12	7	36	19	23.9	13.8
100,001–200,000 .....	12	10	25	17	11.3	8.8
50,001 to 100,000 .....	9	6	13	7	4.2	1.8
30,001 to 50,000 .....	15	7	17	10	4.0	2.1
≤30,000 .....	51	22	57	26	4.2	1.9
Totals .....	108	65	199	150	100.0	100.0

Source for 2001 data: EIA, *Annual Energy Review*, Table 5.9, "Refinery Capacity and Utilization, 1949–2000."

Source for 1999 data: U.S. Department of Energy, *Petroleum Supply Annual*, 1989.

Examining the distribution of refineries shows the same long-term trends. Refineries of 50,000 bpcd or less represent only 35.9 percent of total refineries in 2001 as compared to 53.8 percent in 1989 (see Table 3, below).

TABLE 3

Refinery size	Percent of total operable refineries	
	1989	001
Refineries > 100,000 bpcd .....	27.6	37.9
Refineries 50,001 to 100,000 bpcd .....	18.6	26.1
Refineries 10,001 to 50,000 bpcd .....	34.7	26.1
Refineries ≤ 10,000 bpcd .....	19.1	9.8
Totals .....	100.0	100.0

Source: EIA, *Petroleum Supply Annual 2000*, Volume 1, Table 40.

This increased share of capacity among large refineries is similar to the trend SBA observed when it last studied this industry for the 1992 size standard change. Table 4, below, compares the 1979 to 1989 changes with the 1989 to 2001 changes.

TABLE 4

Refinery size	Changes in percent of total operable refineries	
	1979–1989	1989–2001
Refineries > 100,000 bpcd .....	8	5.5
Refineries 50,001 to 100,000 bpcd .....	–16	8.1
Refineries 10,001 to 50,000 bpcd .....	–43	–42.0
Refineries ≤ 10,000 bpcd .....	–63	–60.5

Source for 1989–2001 data: EIA, *Annual Energy Review*, Table 5.9, "Refinery Capacity and Utilization, 1949–2000."

Source for 1979–1999 data: U.S. Department of Energy, *Petroleum Supply Annual*, 1989.

Small refiners, those who meet the current 75,000 bpcd size standard, represent a very small portion of total industry's U.S. capacity. Table 5, below, presents the percentages of total U.S. refining capacity for those refiners above and below the current 75,000 bpd size standard in 2001. The current small refiner share of total industry capacity is 5.8 percent, well below the historical share of approximately 7.5 percent.

TABLE 5

Refiners	Number of bpcd	Percent of total bpcd
Total U.S. Capacity—65 refiners .....	16,595,371	100.0
Total for the 30 refiners > 75,000 bpcd .....	15,635,960	94.2
Total for the 35 refiners ≤ 75,000 bpcd .....	959,411	5.8

Source: EIA, *Petroleum Supply Annual 2000*, Volume 1, Table 40.

Furthermore, there is significant disparity between the average capacity of all refineries owned and/or operated by the thirty largest refiners and the average capacity of refineries owned and/or operated by the thirty-five small refiners. Table 6, below, shows the differences between average capacities of small and large refiners in 2001.

TABLE 6

Refiner	Average Number of bpcd	Number of refineries
Total U.S. Capacity—65 refiners .....	107,067	155
Average for the 30 refiners > 75,000 bpcd .....	146,130	107
Average for the 35 refiners ≤ 75,000 bpcd .....	19,388	48

Source: EIA, *Petroleum Supply Annual 2000*, Volume 1, Table 40.

SBA concludes that these continuing trends towards larger refiners in the industry and the reduced small refiner share of industry capacity support an increase to the capacity component of the petroleum refineries size standard.

### Industry Concentration

The refining industry in the U.S. has undergone substantial restructuring since SBA last increased the size standard. The result has been fewer but larger refiners with fewer but larger refineries. At the same time total U.S. refining capacity is greater. With this industry realignment and increased U.S.

petroleum refining capacity, the total U.S. refining capacity has become increasingly concentrated among a few of the largest refiners. Since 1989, the top four and top eight refiners have increased their share of total industry refining capacity (see Table 7, below). The increasing trend of industry concentration further supports an

increase to the current capacity size standard.

TABLE 7

Refiners	Percent of U.S. refining capacity as of January 1	
	1990	2001
Four largest .....	31.0	34.9
Eight largest .....	49.1	54.3

Source: EIA, *Petroleum Supply Annual 2000*, Volume 1, Table 40.

### Capital Costs

The Petroleum Refineries industry is one of the most capital intensive industries in the economy. In recent years, increasing environmental regulations (such as those required by the Clear Air Amendments of 1990) have required refiners to make substantial investments in new equipment. For example, the Environmental Protection Agency (EPA) has estimated that its regulations pertaining to sulfur content in gasoline will require refiners, on average, to spend approximately \$44 million to remove sulfur during the refining process and an additional \$16 million per refinery for operating costs associated with desulfurization unit (see 65 FR 6776, dated February 10, 2000). EPA is also considering significant reductions in the use of methyl tertiary butyl ether that will require additional capital investments (see *Oil and Gas Journal*, dated March 27, 2000).

Environmental requirements have led, in part, to the consolidations resulting in a fewer number of small refiners in

the industry over the last 10 years. Refiners have increased operations to spread the cost of environmental compliance across large volumes and to lower costs through operating efficiencies. The expected environmental demands on the industry and the ability of small refiners to spread investment costs across large volumes is another indicator that SBA should increase its refining capacity size standard.

To reduce costs larger refiners have formed downstream mergers and joint ventures, including some with non-U.S. producers. They thereby reduce their overall investment costs in their refineries. By doing so, they join not only their refining operations, but their marketing operations as well. Joint ventures allow refiners to share these costs without the problems associated with mergers and acquisitions. The small refiners closest to the current size standard, that is those small refiners with capacities not far below 75,000 bpcd, cannot enter into the same type of agreements without jeopardizing, and likely losing, their small business size

status. SBA believes that increasing the bpcd capacity limit will allow these refiners to form joint ventures for similar purposes without losing their small business status for Federal procurement programs.

### Federal Government Procurement Since 1990

Small refiners' share of Federal Government procurements of petroleum has moderately decreased since 1989. Federal Procurement Data Center (FPDC) data for 1989, which SBA analyzed prior to revising the size standard in 1992, indicated that small businesses received about 16 percent of those procurements. For fiscal years 1998–2000, small business share declined to as low as 10.5 percent in FY 1999, while averaging 13.8 percent for the three years (see Table 8, below). Although the decline in share of Federal petroleum contracts to small refiners has not been large, an increase to the size standard will likely maintain the share of small refiners or restore it to previous levels.

TABLE 8

	Total federal petroleum procurements (\$,000)	Small business amount (\$,000)	Small business amount (Percent)
1998 .....	\$2,123,529	\$327,478	15.4
1999 .....	1,902,269	199,994	10.5
2000 .....	2,979,095	438,073	14.7
Three year total .....	7,004,893	965,545	.....
Three year average .....	2,334,964	321,848	13.8

Sources: EIA, *Petroleum Supply Annual 2000*, Volume 1, Table 40; EIA, *Petroleum Supply Annual 1999*, Volume 1, Table 40; and EIA, *Petroleum Supply Annual 1998*, Volume 1, Table 40.

### SBA's Proposals To Revise the Size Standard

SBA is proposing to increase the 75,000 bpd component of the size standard to 155,000 bpcd for purposes of Federal Government procurement. SBA is proposing this increase for the following reasons. Refineries with 155,000 bpcd or less in petroleum capacity account for 7.6 percent of total U.S. petroleum refining. This size

standard restores the share of small refiners to approximate the same level that resulted from the 1992 increase to 75,000 bpd. As stated above (see Table 3, above), small refiners currently account for 5.8 percent of total U. S. capacity.

Currently defined small refiners will be able to grow, merge, joint venture or create other forms of consortia, and at the same time retain their small

business status. The proposed increase to 155,000 bpcd is slightly more than double the current size standard refining capacity component. At this level, a small refiner could operate a refinery equal to the size of the average refinery of the 30 large refiners in the industry January 1, 2001 (see Table 6, above). The proposed level should enable small refiners to expand to

achieve operational efficiencies needed to accommodate increasing environmental requirements. An increase to a lower capacity, while also allowing expansion, may be too limiting for small refiners to achieve meaningful operating efficiencies.

Any refiner at or below 155,000 bpcd and with less than 1,500 employees will qualify as a small refiner. Refiners that have more than 1,500 employees or have capacities over 155,000 bpcd generally have significant operations outside of petroleum refining.

SBA proposes to clarify the capacity measure for determining small business size status by replacing the term "barrels per day" with the term "barrels per calendar day." SBA believes the term "barrels per day" does not reflect the precise intent of the regulation, and can raise questions about whether SBA means "barrels per calendar day" or "barrels per stream day." SBA proposes to accept and use "Barrels per Calendar Day" as EIA has most recently defined it in the glossary to Petroleum Supply Annual 2000, Volume 1. EIA defines "barrels per calendar day" as follows:

*Barrels Per Calendar Day.* The maximum number of barrels of input that can be processed during a 24-hour period after making allowances for the following limitations:

The capability of downstream facilities to absorb the output of crude oil processing facilities of a given refinery. No reduction is made when a planned distribution of intermediate streams through other than downstream facilities is part of a refinery's normal operation;

The types and grades of inputs to be processed; the types and grades of products expected to be manufactured;

The environmental constraints associated with refinery operations;

The reduction of capacity for scheduled downtime such as routine inspection, mechanical problems, maintenance, repairs, and turnaround; and

The reduction of capacity for unscheduled downtime such as mechanical problems, repairs, and slowdowns.

SBA proposes to clarify further the capacity measure for determining small business size status by adding to footnote 4 the phrase "total Operable Atmospheric Crude Oil Distillation Capacity" as EIA uses the term in Petroleum Supply Annual 2000, Volume 1. EIA defines "Operable Capacity" as follows:

*Operable Capacity.* The amount of capacity that, at the beginning of the period, is in operation; not in operation and not under active repair, but capable of being placed in operation within 30 days; or not in operation but under active repair that can be completed within 90 days. Operable capacity is the sum of the operating and idle capacity and is

measured in barrels per calendar day or barrels per stream day.

EIA defines Atmospheric Crude Oil Distillation" as follows:

*Atmospheric Crude Oil Distillation.* The refining process of separating crude oil components at atmospheric pressure by heating to temperatures of about 600° to 750° F (depending on the nature of the crude oil and desired products) and subsequent condensing of the fractions by cooling.

By stating "155,000 bpcd of total Operable Atmospheric Crude Oil Distillation Capacity," it will be clear that the size standard includes both a concern's operating and its idle capacity. This is consistent with EIA that uses the total of operating and idle capacities in Petroleum Supply Annual 2000, Volume 1, Table 40, "Refiners" Operable Atmospheric Crude Oil Distillation Capacity," and in earlier years as well.

### **Dominant in Field of Operation**

Section 3(a) of the Small Business Act (15 U.S.C. 632(a)) defines a small concern as one that is (1) independently owned and operated, (2) not dominant in its field of operation and (3) within detailed definitions or size standards established by SBA Administrator. SBA considers as part of its evaluation of a size standard whether a business concern at or below a proposed size standard would be considered dominant in its field of operation. This assessment generally considers the market share of firms at the proposed or final size standard, or other factors that may show whether a firm can exercise a major controlling influence on a national basis in which significant numbers of business concerns are engaged.

SBA has determined that no firm at or below the proposed size standards for petroleum refiners would be of a sufficient size to dominate its field of operation. The largest firm at the proposed size standard level generates less than 0.9% of total U. S. refining capacity. This level of market share effectively precludes any ability for a refiner at or below the proposed size standard to exert a controlling effect on this industry.

### **Alternatives to 155,000 Bpcd That SBA Considered**

SBA considered three alternatives to its proposal. Each of these is discussed below.

1. Delete the capacity requirement, the request for which prompted SBA's examination of the size standard. The introduction to this rule explain the reasons why SBA has elected to increase the capacity component rather than eliminating it. SBA, however, welcomes

comments on the advantages and disadvantages of retaining or eliminating the capacity component.

2. Propose a capacity between 75,000 bpcd and 155,000 bpcd. SBA estimates that capacity below 155,000 bpcd would not restore small businesses to the level they had before the size standard was last increased since no refiners would gain small business status. A 155,000 bpcd capacity limit includes all refiners that have 1,500 employees or less. At 155,000 bpcd, two additional refiners would qualify as small. Further, a capacity limit below 155,000 bpcd may be insufficient to allow small refiners to grow, merge, or otherwise share resources, without losing their small business size eligibility. This would defeat the main purpose of increasing the size standard.

3. Propose higher capacity limits. SBA considered capacities above 155,000 bpcd. SBA believes that 155,000 bpcd capacity is sufficient to enable small refiners to merge or form alliances and thereby reduce their costs while increasing the profitability of their activities. Further, SBA estimates that a higher bpcd capacity would enable no more refiners to become eligible as small businesses, because refiners with capacities above 155,000 bpcd have, to the extent SBA could determine, more than 1,500 employees.

### **Comments Requested**

SBA requests comments on its proposal to increase the capacity component of the size standard from 75,000 bpd to 155,000 barrels per calendar day (bpcd) total Operable Atmospheric Crude Oil Distillation. While SBA proposes this numerical capacity limit for small refiners to qualify as small businesses, SBA will consider the other alternatives as well, including the elimination of a bpcd limit, if comments warrant SBA's doing so. SBA also requests comments on its proposals to clarify the size measure by adopting the more precise term of "barrels per calendar day" in place of "barrels per day." SBA also requests comment on its proposal to measure in bpcd a refiner's total Operable Atmospheric Crude Oil Distillation capacity. Specifically, SBA requests comments on the following issues:

1. Whether SBA should eliminate the capacity component, as requested, and the reasons why having no capacity limit as a component of the standard would be better for small refiners than retaining one.

2. Whether 155,000 bpcd is sufficient capacity for refiners to grow, merge, consolidate or otherwise share resources for Federal Government procurement,

without losing their small business eligibility.

3. Whether SBA should adopt a capacity that is higher or lower than 155,000 bpcd. Commenters who recommend an alternative bpcd limit should also provide reasons why they believe their recommended capacity would be a more appropriate size for this industry for purposes of Federal Government procurement.

4. Whether SBA's estimate of the number of additional refiners that may gain eligibility as small refiners, as well as SBA's estimate of their capacity, accurately reflects the possible result of this proposed change.

5. Whether an increase to 155,000 bpcd would have any adverse effects on currently defined small refiners.

6. Whether SBA's proposal to adopt "barrels per calendar day" to replace "barrels per day" is acceptable.

7. Whether SBA's proposal to adopt as a uniform measurable capacity a refiner's total Operable Atmospheric Crude Oil Distillation as used by EIA is acceptable.

8. Whether SBA should establish the 155,000 bpcd and 1,500 employees size standards to all Federal programs using a small business definition for a small petroleum refiner instead of just to Federal Government procurement. If SBA receives favorable comments on this, SBA will consider issuing a separate proposed rule on the issue.

**Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35.) and the Regulatory Flexibility Act (5 U.S.C. 601-612)**

The Office of Management and Budget (OMB) has determined that the proposed rule is a "significant" regulatory action for purposes of Executive Order 12866. The rule affects Federal Government agencies purchasing refined petroleum products and the businesses that compete in selling petroleum products to the Federal Government. Increasing the 75,000 bpcd size standard to 155,000 bpcd will enable small refiners to expand their refining operations or to merge with other small refiners and continue to compete for Federal petroleum procurements set aside for small businesses or for the 8(a) and HUBZone Empowerment Contracting Programs, as well as those awarded through full and open competition after application of the HUBZone or small disadvantaged business price evaluation preference or adjustment. Also, two refiners may obtain small business status under the proposed size standard allowing them to compete for set-aside

petroleum procurements. Federal agencies could benefit from the higher size standards if the newly defined and expanding small refiners compete for more set-aside petroleum procurements. The larger base of small refiners would likely increase competition and lower the prices on set-aside petroleum procurements. A higher size standard may also influence Federal agencies to set aside more petroleum procurements. If procurements switch from competition among all sources to competition among only small businesses, prices could increase to the Federal Government. SBA believes that price increases associated with set-aside procurements would be minimal since set-asides must be awarded at fair and reasonable prices. The increased size standard will allow, and possibly encourage, small refiners to increase their operational efficiencies without jeopardizing their small business status. These expanding small refiners would become more competitive and thereby result in lower prices to the Federal Government and to private sector customers.

The higher size standard may have distributional effects among large and small refiners. Although the actual outcome of the gains and losses among small and large refiners cannot be estimated with certainty, several trends are likely to emerge. The newly defined and expanding small refiners may obtain petroleum contracts from what would have been awarded to currently defined small refiners. If Federal agencies were to set aside more procurements for small businesses, this could allow currently defined small refiners to compete for more petroleum procurements and offset potential losses to the newly defined and expanding small refiners on other set-aside procurements. Large refiners would lose some Federal petroleum contracts to small refiners if Federal agencies decide to set aside more petroleum procurements. The potential loss of contracts to large businesses would be limited to the amount of petroleum the newly defined and expanding small refiners were willing and able to sell to the Federal Government. Small nonmanufacturers may also obtain additional petroleum contracts as a result of a higher petroleum size standard. On set-aside petroleum procurements, a small nonmanufacturer must supply the product of a small petroleum refiner. With a larger base of small refiners, nonmanufacturers would have access to a larger supply of petroleum products from small refiners. The potential gain of contracts to small

nonmanufacturers would be limited to the amount of petroleum the newly defined and expanding small refiners were willing and able to supply through a third party as opposed to selling directly to the Federal Government.

The proposed rule, however, does not create a serious inconsistency or otherwise interfere with another agency's action; materially affect the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients; or raise novel, legal or policy issues arising out of legal mandates, President's priorities, or the principles set forth in EO 12866.

For purposes of Executive Order 12988, SBA has determined that this rule is drafted, to the extent possible under standards in Section 3 of the order.

For purposes of Executive Order 13132, SBA has determined that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule does not impose any new reporting or recordkeeping requirements.

Under the Regulatory Flexibility Act (RFA) SBA has determined that this rule as drafted, including the alternatives to the proposed standard, will not have a significant impact on a substantial number of small entities. Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) of this rule addressing (a) the reasons and objectives of the rule; (b) SBA's description and estimate of the number of small entities to which the rule will apply; (c) the projected reporting, record keeping, and other compliance requirements of the rule; (d) the relevant Federal rules which may duplicate, overlap or conflict with the rule; and (e) alternatives considered by SBA.

*(a) Reasons for This Action*

As discussed in the supplemental information, this rule, if adopted, will better define a small refiner for purposes of Federal Government procurement of refined petroleum. It will include in the definition as small all U.S. refiners that have 1,500 employees or less. It will also increase the small refiners' share of the U.S. total refining capacity to approximately the level it was after SBA's last two increases to this standard. It will allow small refiners to respond to larger Federal Government procurement opportunities. At the same time they will be able to expand and grow by forming joint ventures and similar resource sharing arrangements

without losing their small business eligibility for Federal Government procurement.

*(b) Objectives and Legal Basis for the Proposed Rule*

SBA's objective is to define "small refiner" better and to enable small businesses to participate in more and larger Federal Government procurement opportunities. Section 3(a) of the Small Business Act (15 U.S.C. 632(a)) gives SBA the authority to establish and change size standards.

*(c) Description and Estimate of the Number of Small Entities To Which the Rule Will Apply*

SBA estimates that there will be no more than two newly designated small businesses. Because SBA does not propose to change the 1,500 employee size standard, refiners will only gain eligibility if they have less than 155,000 bpcd as well as no more than 1,500 employees. With regard to refiners that have capacities in excess of 75,000 bpcd, SBA described in the **SUPPLEMENTARY INFORMATION** that it based its estimate of number of employees on 10Ks filed with the Securities and Exchange Commission, Annual Reports and other information available to the public.

Refiners that currently have less than 75,000 bpd capacities are unaffected by this proposed rule, except to the extent that they may take advantage of opportunities arising from this rule. Also, SBA does not believe there will be significantly increased competition that could harm small or other than small business refiners. On the contrary, small businesses will be able to bid on more and larger Federal procurements in a fashion much like the largest refiners, though on a smaller scale, proportionate to their sizes.

Federal procurement programs are voluntary, and this proposed rule, if adopted, will not impose any significant costs on any small business companies participating in Federal procurement programs. Further, the rule will, if adopted, not affect the amount of refined petroleum purchased by the Federal Government. Federal Government procurement dollars are expected to remain about the same. Since SBA estimates that no more than two refiners, not now small, could become eligible, they would have little impact on the distribution of total Federal procurement dollars.

Furthermore, the two refiners are not currently participating in Federal procurement, according to FPDC data. In addition, since more smaller refiners will be able to share resources, they will

be eligible for more Federal procurement dollars. However, given that all small refiners combined will still only account for 7.7 percent of total U.S. refining capacity, the impact on larger refiners will be negative but negligible, though it will be a positive and significant one on small refiners.

*(d) Imposition of Additional Reporting or Recordkeeping Requirements on Small Businesses*

This rule does not impose any new information collection requirements on small refiners or other small businesses, and therefore will impose none that could require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520. The proposed new size standard does not impose any additional reporting, record keeping or compliance requirements on small entities. Increasing the petroleum refiners' capacity size standard expands access to Federal Procurement programs that assist small businesses, but does not impose a regulatory burden as they neither regulate nor control business behavior.

*(e) Relevant Federal Rules That May Duplicate, Overlap or Conflict With This Rule*

This rule does not duplicate, overlap or conflict with any other Federal rules. This rule applies to the Federal Government's procurement of refined petroleum products only, and does not apply to any other Federal program for which a refiner would have to qualify as a small business.

*(f) Alternatives That SBA Considered*

SBA considered three alternatives to this rule, namely deleting the capacity requirement in its entirety, and capacities above and below 155,000 bpcd. SBA explains in the **SUPPLEMENTARY INFORMATION** above why it opted to propose 155,000 bpcd rather than another amount or none at all. SBA specifically asks for comments on each of these alternatives, however, and will consider an alternative if public comments support one of them in lieu of the proposed 155,000 bpcd.

**List of Subjects in 13 CFR Part 121**

Administrative practice and procedure, Government procurement, Government property, Grant programs-business, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR part 121 as follows:

**PART 121—SMALL BUSINESS SIZE REGULATIONS**

1. The authority citation for Part 121 is revised to read as follows:

**Authority:** Pub L. 105-135 sec. 601 *et seq.*, 111 Stat. 2592; 15 U.S.C. 632(a), 634(b)(6), 637(a), 638, 644(c), and 662(5); and Sec. 304, Pub. L. 103-403, 108 Stat. 4175, 4188.

2. In § 121.201, under Subsector 324, the entry for NAICS Code 324110 is republished and footnote 4 is revised to read as follows:

**§ 121.201 What size standards has SBA identified by North American Industry Classification System Codes?**

NAICS codes	NAICS description (N.E.C. = not elsewhere classified)	Size standard in number of employees or millions of dollars
*	*	*
324110	Petroleum Refineries	41,500
*	*	*

**Footnotes**

\* <sup>4</sup> NAICS code 324110—For purposes of Federal Government procurement, the petroleum refiner must be a concern that has no more than 1,500 employees nor more than 155,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity. 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.

Dated: November 1, 2001.

**Hector V. Barreto,**  
Administrator.

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 868**

**[Docket No. 01N-0576]**

**Medical Devices; Reclassification of the Cutaneous Carbon Dioxide (PcCO<sub>2</sub>) and the Cutaneous Oxygen (PcO<sub>2</sub>) Monitor**

**AGENCY:** Food and Drug Administration, HHS.