

### Emergency Action

This rulemaking is necessary on an emergency basis to prevent the introduction of BSE into the United States. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see DATES above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

### Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

This emergency situation makes timely compliance with section 604 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) impracticable. We are currently assessing the potential economic effects of this action on small entities. Based on that assessment, we will either certify that the rule will not have a significant economic impact on a substantial number of small entities or publish a final regulatory flexibility analysis.

### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has retroactive effect to June 4, 2002; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

### Paperwork Reduction Act

This interim rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

### List of Subjects in 9 CFR Part 94

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, we are amending 9 CFR part 94 as follows:

### PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

1. The authority citation for part 94 is revised to read as follows:

**Authority:** 7 U.S.C. 450, 7711–7714, 7751, 7754, 8303, 8306, 8308, 8310, 8311, and 8315; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 42 U.S.C. 4331 and 4332; 7 CFR 2.22, 2.80, and 371.4.

#### § 94.18 [Amended]

2. In § 94.18, paragraph (a)(1) is amended by adding, in alphabetical order, the word “Israel,”.

Done in Washington, DC, this 12th day of July, 2002.

**Peter Fernandez,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 02–18160 Filed 7–17–02; 8:45 am]

**BILLING CODE 3410–34–P**

### SMALL BUSINESS ADMINISTRATION

#### 13 CFR Parts 121, 124, 134

**RIN 3245–AE71**

#### Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases before the Office of Hearings and Appeals

**AGENCY:** Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The Small Business Administration (SBA) amends its regulations governing proceedings before the Office of Hearings and Appeals (OHA). The SBA also makes conforming changes to several sections of the regulations governing the Small Business Size Determination program and the 8(a) Business Development (8(a) BD) program.

This rule improves the appeals process by revising and clarifying procedures, particularly those on filing, service, and calculating deadlines that have proven to be “stumbling blocks,” causing additional litigation and delays; expedites certain procedures; conforms the regulations and procedures developed by case law and prevailing practice; and makes plain language revisions.

**DATES:** *Effective Date:* This rule is effective on September 16, 2002.

*Applicability Date:* This rule does not apply to any case already pending at OHA on September 16, 2002. The rule applies to cases arising from:

(a) SBA actions taken or determinations made on or after September 16, 2002, including 8(a) and SDB determinations (part 124), size determinations (part 121), debt collections (part 140), and development cases (part 120);

(b) in NAICS code appeals, solicitations or amendments, issued on or after September 16, 2002, that include NAICS code designations (§§ 121.1102, 134.304(a)(3));

(c) in SBA Employee Dispute Resolution Cases, decisions by appropriate management officials made or overdue on or after September 16, 2002 (Standard Operating Procedure 37 71 02, ¶ 3–6, available at [www.sba.gov/library/soprooom.html](http://www.sba.gov/library/soprooom.html)); or

(d) SBA orders to show cause (§ 134.202(b) or (c)) issued on or after September 16, 2002.

#### FOR FURTHER INFORMATION CONTACT:

Michael J. Wolter, Attorney-Advisor, Office of Hearings and Appeals, at (202) 401–1420 or [oha@sba.gov](mailto:oha@sba.gov). If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service at 1–800–877–8339, 24 hours per day, 7 days per week. (If you have any problem using this number, call Customer Service at 1–800–877–0996.)

**SUPPLEMENTARY INFORMATION:** With this rule, the SBA revises 13 CFR part 134, the rules of procedure governing cases before the Office of Hearings and Appeals, improving and clarifying various procedures; and makes conforming changes to the sections of 13 CFR part 121, the Small Business Size Regulations, and 13 CFR part 124, the 8(a) Business Development program, that relate to OHA appeals. The SBA proposed this rule in the **Federal Register**, 67 FR 11057 (Proposed Rule), on March 12, 2002. The Proposed Rule included “Highlights of [the] Proposed Rule,” 67 FR at 11057–11058; a “Section-by-Section Analysis,” 67 FR at 11058–11062; the amendatory instructions and text, 67 FR at 11063–11068; and a request for comments, 67 FR at 11057.

The SBA published two corrections to the Proposed Rule: The first, 67 FR 13108, on March 21, 2002, corrected the Regulation Identifier Number (RIN) to that shown here. The second, 67 FR 13294, on March 22, 2002, clarified the amendatory text for § 134.313; and clarified amendatory instruction 50.c., pertaining to § 134.406(c).

During the Proposed Rule’s 30-day comment period, SBA received no

comments regarding the proposed changes. SBA itself corrected some errors of grammar, form, or punctuation not enumerated here. SBA also found several provisions that were inaccurate or unclear. These provisions are discussed below, in their numerical order.

In the amendatory text for § 124.305(c) (appeal of a suspension from the 8(a) Program), Proposed Rule, 67 FR at 11063, “applicant concern” should read “Participant.” This rule corrects an error contained in 63 FR 35726, 35752 (1998 Rule).

In addition to the changes to § 134.202 already discussed in the Proposed Rule, 67 FR at 11059, this rule corrects a typographical error contained in the 1998 Rule at 35766, amendatory instruction 8 (amending § 134.202(d)): “§ 134.305” (concerning size appeal petitions) should read “§ 124.305” (addressing suspension and suspension appeals). The amendatory text for § 134.202(a)(4), Proposed Rule, 67 FR at 11064, included this correction, but the analysis did not explain it.

The analysis for § 134.211(b) states that the rule “would require the moving party, in most motions, to obtain and to state, in the motion itself, the other parties’ positions on the motion.” Proposed Rule, 67 FR at 11060. Similarly, the amendatory text states that the moving party “must make reasonable efforts to contact all non-moving parties prior to filing the motion to determine whether they oppose the motion, and must set forth in the motion all non-moving parties’ positions.” Proposed Rule, 67 FR at 11065–11066. This language could be construed to require the moving party to detail each non-moving party’s position on the motion; however, the SBA did not intend that. As the Proposed Rule states, SBA’s intent is to avoid a 20-day delay to await a response that, if no one opposes the motion, is unnecessary. Proposed Rule, 67 FR at 11060. Therefore, this rule clarifies that, before filing the motion, the moving party must make reasonable efforts to contact any non-moving party to determine whether the party will oppose the motion; and then state in the motion, as to each non-moving party, either whether the party plans to oppose the motion or what efforts the moving party made to learn whether that party plans to oppose the motion.

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

SBA has determined that this rule has no significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule revises some of the rules of practice for SBA administrative proceedings to simplify those rules and make them easier for the few small businesses that engage in administrative litigation with the SBA to understand and to use. Accordingly, this rule is purely procedural and does not affect the operations of small entities.

For purposes of the Paperwork Reduction Act (44 U.S.C. Ch. 35), SBA certifies that this rule imposes no new reporting or record-keeping requirements on firms. This rule revises certain procedures for administrative litigation, and those revisions do not require firms to maintain any records or make any reports to SBA they do not already maintain or make.

OMB has determined this rule is not a “significant” regulatory action within the meaning of Executive Order 12866. The rule is merely procedural and, therefore, will not have an annual economic effect of \$100 million or more or have any adverse effect on any sector of the economy or on State, local, or tribal governments or communities.

For purposes of Executive Order 12988, SBA certifies that it has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order. This action has no retroactive or preemptive action.

For purposes of Executive Order 13132, SBA certifies that this rule has no federalism implications warranting the preparation of a Federalism Assessment.

### **List of Subjects**

#### *13 CFR Part 121*

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Loan programs—business, Small businesses.

#### *13 CFR Part 124*

Government procurement, Hawaiian Natives, Minority businesses, Reporting and recordkeeping requirements, Technical assistance, Tribally owned concerns.

#### *13 CFR Part 134*

Administrative practice and procedure, Organization and functions (Government agencies).

For the reasons set forth in the preamble, SBA amends parts 121, 124, and 134 of Title 13, Code of Federal Regulations (CFR), as follows:

### **PART 121—[AMENDED]**

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

**Authority:** 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c), and 662(5); and Sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188.

2. In § 121.1009, revise paragraph (h) to read as follows:

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

\* \* \* \* \*

(h) Limited reopening of size determinations. In cases where the size determination contains clear administrative error or a clear mistake of fact, SBA may, in its sole discretion, reopen the size determination to correct the error or mistake, provided no appeal has been filed with OHA.

3. Revise § 121.1101 to read as follows:

#### **§ 121.1101 Are formal size determinations subject to appeal?**

A formal size determination made by a Government Contracting Area Office or by a Disaster Area Office may be appealed to OHA. The procedures governing OHA appeals are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a formal size determination may be sought in a court.

4. Revise § 121.1102 to read as follows:

#### **§ 121.1102 Are NAICS code designations subject to appeal?**

A NAICS code designation made by a procuring activity contracting officer may be appealed to OHA. The procedures governing OHA appeals are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a NAICS code designation may be sought in a court.

### **PART 124—[AMENDED]**

5. The authority citation for part 124 continues to read as follows:

**Authority:** 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d) and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, and 42 U.S.C. 9815.

6. In § 124.206, revise paragraph (c) to read as follows:

**§ 124.206 What appeal rights are available to an applicant that has been denied admission?**

\* \* \* \* \*

(c) The applicant may initiate an appeal by filing a petition in accordance with part 134 of this chapter with OHA within 45 days after the applicant receives the Agency decision.

\* \* \* \* \*

- 7. Amend § 124.304 as follows:
a. Revise the second sentence of paragraph (b) and remove the last sentence; and
b. Revise the last sentence of paragraph (e).
The revisions read as follows:

**§ 124.304 What are the procedures for early graduation and termination?**

\* \* \* \* \*

(b) \* \* \* The Letter of Intent to Terminate or Graduate Early will set forth the specific facts and reasons for SBA's findings, and will notify the concern that it has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination or early graduation.

\* \* \* \* \*

(e) \* \* \* If a Participant does not appeal a Notification of Early Graduation or Termination within 45 days after the Participant receives the Notification, the decision of the AA/8(a)BD is the final agency decision effective on the date the appeal right expired.

\* \* \* \* \*

8. In § 124.305, revise the first sentence of paragraph (c) to read as follows:

**§ 124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?**

\* \* \* \* \*

(c) The Participant may appeal a Notice of Suspension by filing a petition in accordance with part 134 of this chapter with OHA within 45 days after the concern receives the Notice of Suspension pursuant to paragraph (b) of this section. \* \* \*

\* \* \* \* \*

9. In § 124.515, revise paragraph (i) to read as follows:

**§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?**

\* \* \* \* \*

(i) The 8(a) contractor may appeal SBA's denial of a waiver request by

filing a petition with OHA pursuant to part 134 of this chapter within 45 days after the contractor receives the Administrator's decision.

**PART 134—[AMENDED]**

10. The authority citation for part 134 is revised to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 648(l), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

- 11. Amend § 134.101 as follows:
a. Add new definitions for "Appeal petition" and "NAICS code" in alphabetical order;
b. Revise the definitions for "Party," "Petition," and "Pleading"; and
c. Remove the definition for "SIC code."

The revisions and additions read as follows:

**§ 134.101 Definitions.**

\* \* \* \* \*

Appeal petition has the same meaning as petition.

\* \* \* \* \*

NAICS code means North American Industry Classification System code.

\* \* \* \* \*

Party means the petitioner, appellant, respondent, or intervenor, and the contracting officer in a NAICS code appeal.

\* \* \* \* \*

Petition (or appeal petition) means a written complaint, a written appeal from an SBA determination, or a written request for the initiation of proceedings before OHA.

Pleading means a petition, an order to show cause commencing a case, an appeal petition, an answer, a response, or any amendment or supplement to those documents.

\* \* \* \* \*

12. Amend § 134.102 as follows:

- a. Revise paragraph (d);
b. In paragraph (k), remove the acronym "SIC" and add the acronym "NAICS" in its place;
c. In paragraph (m), remove the last word "and";
d. Redesignate existing paragraph (n) as paragraph (r); and
e. Add new paragraphs (n) through (q).

The revisions and additions read as follows:

**§ 134.102 Jurisdiction of OHA.**

\* \* \* \* \*

(d) The eligibility of any bank or non-bank lender to continue to participate in SBA loan programs under the Act and part 120 of this chapter, or to do so with

preferred or certified status, and any other appeal that is specifically authorized by part 120 of this chapter;

\* \* \* \* \*

(n) Appeals from the following small disadvantaged business (SDB) determinations under part 124 of this chapter:

(1) SBA's determination that an applicant firm does not qualify for certification, or that a certified SDB no longer qualifies for the program; and

(2) A Private Certifier's ownership and control determination made on a firm's application for certification;

(o) The suspension, termination, or non-renewal of cooperative agreements with Women's Business Centers and Small Business Development Centers under the Act and part 130 of this chapter;

(p) Certain matters involving debarments and suspensions under part 145 of this chapter;

(q) The decision of the Appropriate Management Official in SBA Employee Dispute Resolution Process cases (Employee Disputes) under Standard Operating Procedure 37 71 02 (available at http://www.sba.gov/library/soproom.html); and

\* \* \* \* \*

**§ 134.103 [Amended]**

13. In § 134.103, paragraph (b), remove the last sentence.

**§ 134.201 [Amended]**

14. Amend § 134.201 as follows:
a. Designate the first two sentences of the existing text and the last sentence of the existing text as paragraphs (a) and (b), respectively; and

b. In the first sentence of newly designated paragraph (a), remove the acronym "SIC" and add in its place the acronym "NAICS".

15. Revise § 134.202 to read as follows:

**§ 134.202 Commencement of cases.**

(a) A party other than the SBA may commence a case by filing a written petition within the following time periods:

(1) Except as provided by paragraphs (a)(2) through (a)(5) of this section, no later than 45 days from the date of receipt of the SBA action or determination to which the petition relates;

(2) In debt collection proceedings under part 140 of this chapter, no later than 15 days after receipt of a notice of indebtedness and intention to collect such debt by salary or administrative offset;

(3) In applications for an award of fees pursuant to subpart E of this part, no

later than 30 days after the decision to which it applies becomes final;

(4) For 8(a) program suspension proceedings, see § 124.305 of this chapter;

(5) For SBA Employee Disputes, see Standard Operating Procedure 37 71 02, available at [www.sba.gov/library/soproom.html](http://www.sba.gov/library/soproom.html).

(b) The SBA may commence a case by issuing to the respondent an appropriate written order to show cause and filing the order to show cause with OHA.

(c) Cases concerning Small Business Investment Company license suspensions and revocations and cease and desist orders must be commenced with an order to show cause containing a statement of the matters of fact and law asserted by the SBA, the legal authority and jurisdiction under which a hearing is to be held, a statement that a hearing will be held, and the time and place for the hearing.

16. Revise § 134.203 to read as follows:

**§ 134.203 The petition.**

(a) A petition must contain the following:

- (1) The basis of OHA's jurisdiction;
- (2) A copy of the SBA determination being appealed, if applicable, and date received;
- (3) A clear and concise statement of the factual basis of the case;
- (4) The relief being sought;
- (5) The name, address, telephone number, facsimile number, and signature of the petitioner or its attorney;
- (6) A certificate of service (see § 134.204(d)); and
- (7) In a debt collection case, a statement showing when the petitioner received the SBA notice initiating the debt collection proceeding (see § 140.3 of this chapter).

(b) A petition also must contain additional information or documents as required by the applicable program regulations in this chapter or by other subparts of this part 134. For SBA Employee Disputes, see Standard Operating Procedure 37 71 02, available at [www.sba.gov/library/soproom.html](http://www.sba.gov/library/soproom.html).

(c) A petition which does not contain all of the information required by paragraphs (a) and (b) of this section may be dismissed, with or without prejudice, at the Judge's own initiative, or upon motion of the respondent.

17. Amend § 134.204 as follows:

- a. Revise the heading of the section;
- b. Revise paragraphs (a) through (d);
- c. Remove paragraph (e); and
- d. Redesignate existing paragraph (f) as new paragraph (e).

The revisions read as follows:

**§ 134.204 Filing and service requirements.**

(a) *Methods of filing and service.* Pleadings or other submissions must be filed and served by mail, delivery, or facsimile. Mail includes first class (including certified and registered), express, and priority mail. For good cause, the Judge may order that filing or service be effected by one of these methods.

(b) *Filing.* Filing is the receipt of pleadings and other submissions at OHA.

(1) *OHA's address.* OHA accepts filings between the hours of 8:30 a.m. and 5 p.m. eastern time at the following address: Docketing Clerk, Office of Hearings and Appeals, Small Business Administration, 409 Third Street, SW., Suite 5900, Washington, DC 20416-0005. OHA's telephone number is (202) 401-8203. The number for OHA's facsimile machine is (202) 205-7059.

(2) The date of filing for pleadings and other submissions filed by mail, delivery, or facsimile is the date the filing is received at OHA. Any filing received at OHA after 5:00 p.m. eastern time is considered filed as of the next day.

(3) *Exhibits.* An exhibit, whether an original or a copy, must be authenticated or identified to be what it purports to be.

(4) *Copies.* No extra copies of pleadings or other submissions need be filed. If a document is offered as an exhibit, a copy of the document will be accepted by the Judge unless—

- (i) a genuine question is raised as to whether it is a true and accurate copy; or
- (ii) it would be unfair, under the circumstances, to admit the copy instead of the original.

(c) *Service.* Service is the mailing, delivery, or facsimile to all other parties of a copy of each pleading or other submission filed with OHA.

(1) Complete copies of all pleadings and other submissions filed with OHA must be served upon all other parties or, if represented, their authorized representatives or their attorneys, at their record addresses.

(2) The date of service is as follows: for facsimile, the date the facsimile is sent; for personal delivery by the party, its employee, or its attorney, the date the document is given to the party served; for commercial delivery, the date the document is given to the delivery service; for mail, the date of mailing. The date of mailing is the date of a U.S. Postal Service postmark or any other proof of mailing. If there is insufficient proof of mailing, there is a

rebuttable presumption that the mailing was made five days before receipt.

(3) If the SBA is a party, the SBA must be served, as required by the applicable program regulations or by other subparts of this part 134. If the SBA office for service is not specified elsewhere, serve: Office of General Counsel, Small Business Administration, 409 Third Street, S.W., Washington, DC 20416. For SBA Employee Disputes, see Standard Operating Procedure 37 71 02, available at [www.sba.gov/library/soproom.html](http://www.sba.gov/library/soproom.html).

(d) *Certificate of service.* A certificate of service shows how, when, and to whom service was made. Every pleading and other submission filed with OHA and served on the other parties must include a certificate of service. The certificate should state: "I certify that on [date], I caused the foregoing document to be served by [either "placing a copy in the mail," "sending a copy by facsimile," "personally delivering a copy," or "giving a copy to a delivery service,"] upon the following: [list name, address, telephone number, and facsimile number of each party served]." The certificate must be signed and include the typed name and title of the individual serving the pleading or other submission.

\* \* \* \* \*

18. Revise § 134.205 to read as follows:

**§ 134.205 Motion for a more definite statement.**

(a) *Procedure.* No later than 15 days after service of the petition or order to show cause, the respondent may file and serve a motion requesting a more definite statement of particular allegations in the petition.

(b) *Stay.* The filing and service of a motion for a more definite statement stays the time for filing and serving an answer or response. The Judge will establish the time for filing and serving an answer or response.

19. Revise § 134.206 to read as follows:

**§ 134.206 The answer or response.**

(a)(1) Except in a case involving a petition appealing from an SBA determination, a respondent must file and serve an answer within 45 days after the filing of a petition or the service of an order to show cause, except that in debt collection cases, answers are due within 30 days. For SBA Employee Disputes, see Standard Operating Procedure 37 71 02, available at [www.sba.gov/library/soproom.html](http://www.sba.gov/library/soproom.html).

(2) The answer must contain the following:

(i) An admission or denial of each of the factual allegations contained in the petition or order to show cause, or a statement that the respondent denies knowledge or information sufficient to determine the truth of a particular allegation;

(ii) Any affirmative defenses; and

(iii) The name, address, telephone number, facsimile number, and signature of the respondent or its attorney.

(3) Allegations in the petition or order to show cause that are not answered in accordance with paragraph (a)(2)(i) of this section will be deemed admitted unless injustice would occur.

(b) Upon the filing of a petition appealing from an SBA determination, the Judge or the AA/OHA will issue an order informing all known parties of the date the appeal was filed. The respondent must file and serve a response to such a petition within 45 days after the filing of such a petition. The response need not admit or deny the allegations in the petition but shall set forth the respondent's positions in support of the SBA determination. The response must also set forth the name, address, telephone number, facsimile number, and signature of the respondent or its attorney.

(c) If a petition or order to show cause is amended or if respondent is not properly served, the Judge will order the time to file an answer or response extended and will specify the date such answer or response is due. If respondent is not properly served with a petition appealing from an SBA determination, the Judge will issue an order directing that the petitioner serve respondent within a specified time and directing respondent to file and serve a response within 45 days after petitioner timely serves respondent in accordance with the order.

(d) If the respondent fails to timely file and serve an answer or response, that failure will constitute a default. Following such a default, the Judge may prohibit the respondent from participating further in the case. If SBA, as respondent to a petition appealing from an SBA determination, fails to timely file and serve its response or the administrative record (where required), the Judge will issue an order directing SBA to file and serve the administrative record by a specified date.

20. Amend § 134.207 as follows:

a. In paragraph (a), revise the first sentence and add a new sentence at the end;

b. Revise paragraph (b); and

c. Revise paragraph (d).

The revisions read as follows:

**§ 134.207 Amendments and supplemental pleadings.**

(a) *Amendments.* Upon motion, and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of amendments to pleadings. \* \* \* The proposed amendment must be filed and served with the motion.

(b) *Supplemental pleadings.* Upon motion, and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of a supplemental pleading setting forth relevant transactions or occurrences that have taken place since the filing of the original pleading. The proposed supplemental pleading must be filed and served with the motion.

\* \* \* \* \*

(d) *Answer or response.* In an order permitting the filing and service of an amended or supplemented petition or order to show cause, the Judge will establish the time for filing and serving an answer or response.

21. Revise § 134.208 to read as follows:

**§ 134.208 Representation in cases before OHA.**

(a) A party may represent itself, or be represented by an attorney. A partner may represent a partnership; a member may represent a limited liability company; and an officer may represent a corporation, trust, association, or other entity.

(b) An attorney for a party who did not appear on behalf of that party in the party's first filing with OHA must file and serve a written notice of appearance.

(c) An attorney seeking to withdraw from a case must file and serve a motion for the withdrawal of his or her appearance.

22. Revise § 134.210 to read as follows:

**§ 134.210 Intervention.**

(a) *By SBA.* SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first.

(b) *By interested persons.* Any interested person may move to intervene at any time until the close of record by filing and serving a motion to intervene containing a statement of the moving party's interest in the case and the necessity for intervention to protect such interest. An interested person is any individual, business entity, or governmental agency that has a direct stake in the outcome of the appeal. The Judge may grant leave to intervene upon

such terms as he or she deems appropriate.

23. Amend § 134.211 as follows:

a. Redesignate existing paragraphs (b) through (d) as paragraphs (c) through (e);

b. Add a new paragraph (b);

c. Revise newly redesignated paragraph (e); and

d. Add a new paragraph (f).

The revisions and additions read as follows:

**§ 134.211 Motions.**

\* \* \* \* \*

(b) *Statement of whether motion is opposed.* Except when filing a motion to dismiss or a motion for summary decision, the moving party must make reasonable efforts before filing the motion to contact any non-moving party and determine whether it will oppose the motion and must state in the motion whether each non-moving party will oppose or not oppose the motion. If the moving party cannot determine whether a non-moving party will oppose the motion, the moving party must describe in the motion the efforts made to contact that non-moving party.

\* \* \* \* \*

(e) *Motion to dismiss.* A respondent may file a motion to dismiss any time before a decision is issued. If an answer or response has not been filed, the motion to dismiss stays the time to answer or respond. If the Judge denies the motion, and an answer or response has not been filed, the respondent must file the answer or response within 20 days after the order deciding the motion.

(f) *Motion for an extension of time.* Except for good cause shown, a motion for an extension of time must be filed at least two days before the original deadline.

24. Amend § 134.212 as follows:

a. In paragraph (c), remove the words "serve and file" and add the words "file and serve" in their place;

b. In paragraph (d), remove the words "serving and filing" and add the words "filing and serving" in their place; and

c. Add a new paragraph (e), to read as follows:

**§ 134.212 Summary decision.**

\* \* \* \* \*

(e) *Appeal petitions from SBA determinations (other than 8(a) determinations).* In a case involving an appeal petition, except as provided in subpart D of this part, if SBA has provided multiple grounds for the determination being appealed, SBA may move for summary decision on one or more grounds. If the Judge finds that

there is no genuine issue of material fact and the SBA is entitled to a decision in its favor as a matter of law as to any such ground, the Judge will grant the motion for summary decision and dismiss the appeal.

**§ 134.213 [Amended]**

25. In § 134.213, paragraph (d), remove the words “serve and file” and add the words “file and serve” in their place.

26. Amend § 134.214 as follows:

a. In paragraph (a), add a new sentence at the end; and

b. In paragraph (d), revise the first two sentences.

The revisions and additions read as follows:

**§ 134.214 Subpoenas.**

(a) \* \* \* Subpoenas are not authorized for proceedings relating to internal Agency determinations, such as Employee Disputes.

(d) *Motion to quash.* A motion to limit or quash a subpoena must be filed and served within 10 days after service of the subpoena, or by the return date of the subpoena, whichever date comes first. Any response to the motion must be filed and served within 10 days after service of the motion, unless a shorter time is specified by the Judge. \* \* \*

**§ 134.215 [Amended]**

27. In § 134.215, paragraph (b), remove the words “serve and file” and add the words “file and serve” in their place.

28. In § 134.217, revise the first sentence and add two new sentences after the first sentence, to read as follows:

**§ 134.217 Settlement.**

At any time during the pendency of a case, the parties may submit a joint motion to dismiss the appeal if they have settled the case, and may file with such motion a copy of the settlement agreement. If the Judge has express authority, under statute, SBA regulation or SBA standard operating procedures, to review the contents of a settlement agreement for legality, the Judge may order the parties to file a copy of the settlement agreement. Otherwise, upon the filing of a joint motion to dismiss, the Judge will issue an order dismissing the case. \* \* \*

29. In § 134.226, paragraph (b), add a sentence at the end to read as follows:

**§ 134.226 The decision.**

\* \* \* \* \*

(b) \* \* \* Time limits for decisions in other types of cases, if any, are indicated

either in the applicable program regulations or in other subparts of this part 134.

\* \* \* \* \*

30. Revise § 134.227 to read as follows:

**§ 134.227 Finality of decisions.**

(a) *Initial decisions.* Except as otherwise provided in paragraph (b) of this section, a decision by the Judge on the merits is an initial decision. However, unless a request for review is filed pursuant to § 134.228(a), or a request for reconsideration is filed pursuant to paragraph (c) of this section, an initial decision shall become the final decision of the SBA 30 days after its service.

(b) *Final decisions.* A decision by the Judge on the merits shall be a final decision in the following proceedings:

(1) Collection of debts owed to SBA and the United States under the Debt Collection Act of 1982 (5 U.S.C. 5514 and 31 U.S.C. 3302, 3701, 3711, 3716–3719) and part 140 of this chapter;

(2) Appeals from SBA 8(a) program determinations under the Act and part 124 of this chapter;

(3) Appeals from size determinations and NAICS code designations under part 121 of this chapter; and

(4) In other proceedings as provided either in the applicable program regulations or in other subparts of this part 134.

(c) *Reconsideration.* Except as otherwise provided by statute, the applicable program regulations in this chapter, or this part 134, an initial or final decision of the Judge may be reconsidered. Any party may request reconsideration by filing with the Judge and serving a petition for reconsideration within 20 days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

31. Amend § 134.228 as follows:

a. Revise paragraph (a);

b. In paragraph (b), remove the words “serve and file with OHA” and add in their place the words “file and serve”.

The revisions read as follows:

**§ 134.228 Review of initial decisions.**

(a) *Request for review.* Within 30 days after the service of an initial decision or a reconsidered initial decision of a Judge, any party, or SBA’s Office of General Counsel, may file and serve a request for review by the Administrator. A request for review must set forth the filing party’s specific objections to the initial decision, and any alleged support

for those objections in the record, or in case law, statute, regulation, or SBA policy. A party must serve its request for review upon all other parties and upon SBA’s Office of General Counsel.

\* \* \* \* \*

32. Revise § 134.229 to read as follows:

**§ 134.229 Termination of jurisdiction.**

Except when the Judge reconsiders a decision or remands the case, the jurisdiction of OHA will terminate upon the issuance of a decision resolving all material issues of fact and law. If the Judge reconsiders a decision, OHA’s jurisdiction terminates when the Judge issues the decision after reconsideration. If the Judge remands the case, the Judge may retain jurisdiction at his or her own discretion, and the remand order may include the terms and duration of the remand.

33. Revise the heading for subpart C to read as follows:

**Subpart C—Rules of Practice for Appeals From Size Determinations and NAICS Code Designations**

**§ 134.301 [Amended]**

34. In § 134.301, paragraph (b), remove the acronym “SIC” and add in its place the acronym “NAICS”.

35. In § 134.302, revise the introductory text and paragraph (b) to read as follows:

**§ 134.302 Who may appeal.**

Appeals from size determinations and NAICS code designations may be filed with OHA by the following, as applicable:

\* \* \* \* \*

(b) Any person adversely affected by a NAICS code designation. However, with respect to a particular sole source 8(a) contract, only the AA/8(a)BD may appeal a NAICS code designation;

\* \* \* \* \*

36. Revise § 134.303 to read as follows:

**§ 134.303 Advisory opinions.**

The Office of Hearings and Appeals does not issue advisory opinions.

37. In § 134.304, revise the section heading and paragraph (a) to read as follows:

**§ 134.304 Commencement of appeals from size determinations and NAICS code designations.**

(a) Appeals from size determinations and NAICS code designations must be commenced by filing and serving an appeal petition as follows:

(1) If the appeal is from a size determination in a pending

procurement or pending Government property sale, then the appeal petition must be filed and served within 15 days after appellant receives the size determination;

(2) If the appeal is from a size determination other than one in a pending procurement or pending Government property sale, then the appeal petition must be filed and served within 30 days after appellant receives the size determination;

(3) If the appeal is from a NAICS code designation, then the appeal petition must be filed and served within 10 days after the issuance of the initial solicitation. If the appeal relates to an amendment affecting the NAICS code, then the appeal petition must be filed and served within 10 days after the issuance of the amendment.

\* \* \* \* \*

38. Amend § 134.305 as follows:

a. In paragraphs (a)(1), (a)(3), and (c), remove the acronym "SIC" wherever it appears and add in its place the acronym "NAICS";

b. In paragraph (a)(4), before the word "and", add the words "facsimile number,"; and

c. Revise paragraph (d) to read as follows:

**§ 134.305 The appeal petition.**

\* \* \* \* \*

(d) *Certificate of service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

\* \* \* \* \*

39. Amend § 134.306 as follows:

a. Revise the section heading;

b. Remove the last sentence of the existing text;

c. Designate the remaining sentence of the existing text as paragraph (a); and

d. Add a new paragraph (b), to read as follows:

**§ 134.306 Transmission of the case file and solicitation.**

\* \* \* \* \*

(b) Upon receipt of an appeal petition pertaining to a NAICS code designation, or a size determination made in connection with a particular procurement, the procuring agency contracting officer must immediately send to OHA a paper copy of both the original solicitation relating to that procurement and all amendments.

40. In § 134.308, revise paragraph (a)(2) to read as follows:

**§ 134.308 Limitation on new evidence and adverse inference from non-submission in appeals from size determinations.**

(a) \* \* \*

(2) A motion is filed and served establishing good cause for the submission of such evidence. The offered new evidence must be filed and served with the motion.

\* \* \* \* \*

41. In § 134.309, revise paragraphs (a) and (b) to read as follows:

**§ 134.309 Response to an appeal petition.**

(a) *Who may respond.* Any person served with an appeal petition, any intervenor, or any person with a general interest in an issue raised by the appeal may file and serve a response supporting or opposing the appeal. The response should present argument.

(b) *Time limits.* The Judge will issue a Notice and Order informing the parties of the filing of the appeal petition, establishing the close of record as 15 days after service of the Notice and Order, and informing the parties that OHA must receive any responses to the appeal petition no later than the close of record.

\* \* \* \* \*

**§ 134.310 [Amended]**

42. In § 134.310, remove the acronym "SIC" and add in its place the acronym "NAICS".

**§ 134.311 [Amended]**

43. In § 134.311, remove the acronym "SIC" and add in its place the acronym "NAICS".

44. Revise § 134.313 to read as follows:

**§ 134.313 Applicability of subpart B provisions.**

Except where inconsistent with this subpart C, the provisions of subpart B of this part apply to appeals from size determinations and NAICS code designations.

**§ 134.314 [Amended]**

45. In § 134.314, remove the acronym "SIC" and add in its place the acronym "NAICS".

46. In § 134.316, add a new sentence at the end of paragraph (b); and add new paragraph (d) to read as follows:

**§ 134.316 The decision.**

\* \* \* \* \*

(b) \* \* \* Where a size appeal is dismissed, the Area Office size determination remains in effect.

\* \* \* \* \*

(d) *Reconsideration.* The decision in a NAICS code appeal may not be reconsidered.

**§ 134.317 [Removed]**

47. Remove existing § 134.317.

48. Redesignate existing § 134.318 as new § 134.317 and revise it, to read as follows:

**§ 134.317 Return of the case file.**

Upon issuance of the decision, OHA will return the case file to the transmitting Area Office. The remainder of the record will be retained by OHA.

49. In § 134.402, add two sentences at the end, to read as follows:

**§ 134.402 Appeal petition.**

\* \* \* This section does not apply to suspension appeals. For suspensions, see § 124.305 of this chapter.

**§ 134.403 [Amended]**

50. Amend § 134.403 as follows:

a. Remove paragraph (a)(3); and

b. In paragraph (b), remove the words "Service should be addressed to" and add in their place the word "Serve".

51. Amend § 134.406 as follows:

a. Revise paragraph (a);

b. In paragraph (b), revise the first sentence;

c. In paragraph (c), revise the first sentence; and remove the last sentence and add two new sentences in its place;

d. Revise paragraph (d); and

e. Revise paragraph (e).

The revisions and additions read as follows:

**§ 134.406 Review of the administrative record.**

(a) Any proceeding conducted under § 134.401(a) through (d) shall be decided solely on a review of the written administrative record, except as provided in § 134.407 and in suspension appeals. For suspension appeals under § 134.401(e), see § 124.305(d) of this chapter.

(b) Except in suspension appeals, the Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. \* \* \*

(c) The administrative record must contain all documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied. \* \* \*

The petitioner may object to the absence of a document, previously submitted to, or sent by, SBA, which the petitioner believes was erroneously omitted from the administrative record. In the absence of any objection by the petitioner or a finding by the Judge pursuant to paragraph (e) of this section that the record is insufficiently complete to decide whether the determination was arbitrary, capricious, or contrary to law, the administrative

record submitted by SBA shall be deemed complete.

(d) Where the Agency files its response to the appeal petition after the date specified in § 134.206, the Administrative Law Judge may decline to consider the response and base his or her decision solely on a review of the administrative record.

(e) The Administrative Law Judge may remand a case to the AA/8(a)BD (or, in the case of a denial of a request for waiver under § 124.515 of this chapter, to the Administrator) for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious, or contrary to law. In the event of such a remand, the Judge will not require the SBA to supplement the administrative record other than to supply the reason or reasons for the determination and any documents submitted to, or considered by, SBA in connection with any reconsideration permitted by regulation that occurs during the remand period. After such a remand, in the event the Judge finds that the reasons upon which the determination is based are absent from any supplemented record, the Judge will find the SBA determination to be arbitrary, capricious, or contrary to law. The Administrative Law Judge may also remand a case to the AA/8(a)BD (or, in the case of a denial of a request for waiver under § 124.515 of this chapter, to the Administrator) for further consideration where it is clearly apparent from the record that SBA made an erroneous factual finding (e.g., SBA double counted an asset of an individual claiming disadvantaged status) or a mistake of law (e.g., SBA applied the wrong regulatory provision in evaluating the case). A remand under this section will be for a reasonable period.

**§ 134.407 [Amended]**

52. In § 134.407, paragraph (a) introductory text, remove the word "The" at the beginning and add the words "Except in suspension appeals, the" in its place.

**§ 134.408 [Redesignated as § 134.409]**

53. Redesignate existing § 134.408 as § 134.409.

54. Add a new § 134.408 to read as follows:

**§ 134.408 Summary decision.**

(a) *Generally.* In any appeal under this subpart D, either party may move or

cross-move for summary decision, as provided in § 134.212.

(b) *Summary decision based on fewer than all grounds.* If SBA has provided multiple grounds for the 8(a) determination being appealed, SBA may move for summary decision on one or more grounds.

(1) *Non-suspension cases.* Except in suspension appeals, if the Judge finds that there is no genuine issue of material fact as to whether SBA acted arbitrarily, capriciously, or contrary to law as to any such ground or grounds, and that the SBA is entitled to a decision in its favor as a matter of law, the Judge will grant the motion for summary decision and dismiss the appeal.

(2) *Suspension cases.* In suspension appeals, if the Judge finds that there is no genuine issue of material fact as to whether adequate evidence exists that protection of the Federal Government's interest requires suspension, as to any such ground or grounds for the proposed suspension, the SBA is entitled to a decision in its favor as a matter of law, and the Judge will grant the motion for summary decision and dismiss the appeal.

**§ 134.409 [Amended]**

55. In newly redesignated § 134.409, paragraph (b), remove the last sentence.

Dated: July 5, 2002.

**Hector V. Barreto,**  
Administrator.

[FR Doc. 02-17618 Filed 7-17-02; 8:45 am]

**BILLING CODE 8025-01-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. 2002-NM-129-AD; Amendment 39-12823; AD 2002-14-23]

**RIN 2120-AA64**

**Airworthiness Directives; Empresa Brasileira de Aeronautica S.A.**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB-135 and -145 series airplanes. This action requires a one-time inspection of the clutch assembly of the horizontal stabilizer actuator (HSA) to verify that at least one locking tab on the key washer is bent into the locking groove of the clutch nut, and follow-on

actions. This action is necessary to prevent a loose or disengaged clutch nut on the HSA clutch assembly, which could result in loss of pitch trim and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

**DATES:** Effective August 2, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 2, 2002.

Comments for inclusion in the Rules Docket must be received on or before August 19, 2002.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2002-NM-129-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: [9-anm-iarcomment@faa.gov](mailto:9-anm-iarcomment@faa.gov). Comments sent via fax or the Internet must contain "Docket No. 2002-NM-129-AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; at the FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:**

Robert Capezzuto, Aerospace Engineer, Systems and Flight Test Branch, ACE-116A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703-6071; fax (770) 703-6097.

**SUPPLEMENTARY INFORMATION:** The Departamento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, recently notified the FAA that an unsafe condition may exist on certain EMBRAER Model EMB-135 and -145 series airplanes. The DAC advises that, on one airplane, a loose clutch nut has