

List of Subjects in 13 CFR Part 121

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

Accordingly, for the reasons stated in the preamble, SBA proposes to amend

part 121 of title 13 of the Code of Federal Regulations as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation of 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. Amend § 121.201 as follows:

a. In the table “Small Business Size Standards by NAICS Industry” under the heading “Subsector 611—Educational Services,” revise the entry for 611519 to read as follows; and

b. Add footnote 17 to the end of the table to read as follows:

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in million of dollars	Size standards in number of employees
*	*	*	*
Subsector 611—Educational Services			
*	*	*	*
611519....	Other Technical and Trade Corps	\$6.0
EXCEPT	Job Corps Centers	¹⁶ \$30.0
*	*	*	*

Footnotes:

¹⁶ NAICS codes 611519—Job Corps Centers. For classifying a Federal procurement, the purpose of the solicitation must be for the management and operation of a U.S. Department of Labor Job Corps Center. The activities involved include admissions activities, lift skills training, educational activities, comprehensive career preparation activities, career development activities, career transition activities, as well as the management and support functions and services needed to operate and maintain the facility. For SBA assistance as a small business concern, other than for Federal government procurements, a concern must be primarily engaged in providing the services to operate and maintain Federal Job Corps Centers.

Dated: November 15, 2002.

Hector V. Barreto,
Administrator.

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 134

RIN: 3245–AE92

Small Business Size Regulations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

AGENCY: Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The Small Business Administration (SBA) proposes to amend its small business size regulations and the regulations applying to appeals of size determinations. The proposed rule would amend the definitions of affiliation, annual receipts, and employees. It would also make procedural and technical changes to cover new programs such as SBA’s HUBZone program and the government-wide Small Disadvantaged Business program. The proposed rule would

codify several long-standing precedents of SBA’s Office of Hearings and Appeals and would clarify the jurisdiction of that office.

DATES: Comments must be received on or before January 21, 2003.

ADDRESSES: Written comments should be addressed to John W. Klein, Associate General Counsel for Procurement Law, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Laura M. Eyester, Office of General Counsel, (202) 619–1801.

SUPPLEMENTARY INFORMATION: SBA’s small business size regulations (13 CFR part 121) are used to determine eligibility for all SBA and Federal programs that require an entity to be a small business concern. In the past, to be considered small, concerns were required to qualify under a particular size standard that corresponded to a four-digit Standard Industrial Classification (SIC) code. Effective October 1, 2000, to be considered small, concerns are required to qualify under a particular size standard that corresponds to the six-digit North American Industrial Classification System (NAICS) code. SBA published

its final rule setting forth the various NAICS codes and corresponding size standards at 65 FR 30836 (May 15, 2000). SBA published a technical correction to the final at 65 FR 53533 (September 5, 2000). That final rule changed all references to SIC codes in part 121 to NAICS codes. This proposed rule would not change any size standards currently corresponding to specific NAICS codes.

With a few exceptions, SBA size standards are based on either average annual receipts or number of employees, depending on the industry. When measuring a concern’s size, the receipts or employees of affiliated concerns are included. The proposed rule would modify the definitions of affiliation, annual receipts, and number of employees. The proposed changes to part 134 would clarify the jurisdiction of SBA’s Office of Hearings and Appeals (OHA) and make certain technical amendments.

Section-by-Section Analysis

SBA proposes to amend § 121.102 by adding a new paragraph (d) that would recognize that there currently exists an internal Size Policy Board at SBA that is responsible for making recommendations to the Administrator

on size standards, other size eligibility requirements, and size protest procedures. In addition, SBA proposes to amend § 121.103 to specifically incorporate into the definition of "affiliation" certain provisions that were previously contained in the regulations. Because there may have been some confusion regarding the more generalized affiliation language when SBA amended its regulations in 1996, SBA believes it is necessary to again specifically state other bases of possible affiliation in the regulations. The section would be revised to state that control may be affirmative or negative, provide an example of negative control, state that control may be exercised indirectly through a third party, and state that affiliation may be found under the totality of the circumstances even though no single factor is sufficient to constitute affiliation. These three changes codify long-standing OHA rulings. See, e.g., *Size Appeal of Jensco Marine, Inc.*, SBA No. SIZ-4330 (1998); *Size Appeal of National Welders*, SBA No. SIZ-4315 (1998); *Size Appeal of First American Tax Valuation, Inc.*, SBA No. SIZ-4206 (1996); and *Size Appeal of Field Support Services, Inc.*, SBA No. SIZ-4176 (1996). (OHA decisions cited in this preamble can be located at www.sba.gov/oha/searchpage.html or by contacting OHA by e-mail at oha@sba.gov or by phone at 202-401-8200.)

This proposed rule would change the title of § 121.103(b) from "Exclusion from affiliation coverage" to "Exceptions to affiliation coverage" for clarity. In addition, the proposed rule would amend § 121.103(b)(2) to clarify the exception to affiliation for Indian tribes (including Alaska Native Corporations), Community Development Corporations (CDCs) or Native Hawaiian Organizations (NHOs). Specifically, the proposed rule would specify that the exception applies whether the tribe, CDC or NHO owns the concern whose size is at issue directly, or through another entity, which is wholly-owned by the tribe, CDC or NHO. The proposed rule would also provide that affiliation could not be found among several tribally, ANC, CDC or NOH-owned concerns based on common management. This is an extension of the current regulation, which precludes affiliation based solely on common ownership. SBA believes that this change is particularly needed in the context of tribally-owned concerns where tribal board members often are also board members of tribally-owned concerns. SBA specifically asks for comments as to whether this exception

from affiliation goes far enough, or whether SBA should provide the same exception to affiliation as that contained for the 8(a) program in § 124.109(c)(2)(iii). SBA notes, however, that the exception to affiliation for the 8(a) program is statutorily based, while the general exception contained in § 121.103(b)(2) is not.

The proposed rule would also add language to both § 121.103(b)(2) and (b)(6) to clarify that SBA may find affiliation other than through common ownership or common management, and with respect to approved mentor/protégé relationships, other than on the basis of the mentor/protégé agreement. This is not a change in policy, but a clarification of existing policy.

SBA proposes two changes to § 121.103(c). Section 121.103(c)(1) would be amended by adding the word "voting" to clarify that only voting stock is considered in determining affiliation. In addition, SBA proposes adding a sentence to § 121.103(c)(2) stating that the presumption of control may be rebutted by showing that control does not in fact exist. For example, in *Size Appeal of Tri-Fuels, Inc.*, SBA No. SIZ-3563 (1992), OHA held that the presumption that minority shareholders owning substantially equal blocks of stock each control a firm was rebutted where a shareholder's agreement specified that each of the shareholders could appoint one of five directors. The proposed rule would also add a new § 121.103(c)(3), which would provide that where a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, SBA will deem the concern's Board of Directors and its Chief Executive Officer (CEO) or President to have the power to control the concern in the absence of evidence to the contrary. In the absence of evidence to the contrary, SBA will find control in such circumstances to rest with the Board of Directors and with the highest ranking officer of the concern (either its CEO or President) because control of the concern must rest somewhere.

Section 121.103(d) discusses affiliation, which arises under stock options, convertible debentures, and agreements to merge. SBA gives present effect to all such arrangements in determining affiliation. SBA proposes to amend the section by setting forth exceptions to this "present effect" rule that have been developed by OHA rulings. See, e.g., *Size Appeal of Consolidated Industries, Inc.*, SBA No. SIZ-4235 (1997). One proposed exception would not give present effect to agreements to open or continue negotiations towards the possibility of a

merger or a sale of stock at some later date. Another proposed exception would not give present effect to options, debentures, and agreements that are subject to conditions that are incapable of fulfillment, speculative, conjectural, remote, or unenforceable under state or Federal law.

Section 121.103(e) covers control through common management and would be amended to clarify that affiliation arises when an officer, director, managing member, or partner controls two concerns. Section 121.103(f) would expand the current regulation at § 121.103(a)(3) covering the concept of "identity of interest." The concept is that two or more persons with an identity of interest, such as members of the same family or with common investments in more than one concern, may be treated as a single party for size determination purposes. See, *Size Appeal of Golden Bear Arborists*, SBA No. SIZ-1899 (1984). Although this provision was deleted as a separate basis for affiliation from part 121 in 1996, when SBA streamlined its regulations, see, 13 CFR 121.401(d) (1995), the concept remained under the "General Principles of Affiliation," and OHA continues to use the identity of interest concept in ruling on affiliation issues. See, e.g., *Size Appeal of Lyons Security Service, Inc.*, SBA No. SIZ-4264 (1997). SBA believes that for purposes of clarity this rule should be explicitly set forth as a separate basis for finding affiliation in the size regulations.

SBA also proposes to add § 121.103(g), "Affiliation based on the newly organized concern rule." This proposed section provides that affiliation may arise where former officers, directors, stockholders, managing members (in a limited liability corporation) or key employees of one concern organize a new concern in the same or related industry and serve as its officers, directors, stockholders, managing members or key employees, and the first concern will provide contractual, financial, or other assistance to the new concern. This provision also previously appeared in SBA's size regulations, and SBA believes that it is appropriate to add it back to the regulations as a separate basis for finding affiliation. SBA notes that even after the regulatory change removing the newly organized concern concept as a separate basis for finding affiliation, OHA has continued to use it from the general principles of affiliation contained in the regulations to find affiliation. See, e.g., *Size Appeal of Lyons Security Service, Inc.*, *supra*; *Size*

Appeal of Frontier Applied Sciences, Inc., SBA No. SIZ-4316 (1998).

SBA proposes to redesignate the joint venture regulation currently at § 121.103(f) to § 121.103(h), clarify it, and define its key terms. SBA receives numerous inquiries concerning the definition of the terms "joint venture" and "teaming arrangement." Therefore, SBA proposes to add definitions of these terms in its regulations. SBA is using the definitions of these terms as set forth in parts 9 and 19 of the Federal Acquisition Regulation (FAR), title 48 of the Code of Federal Regulations, for consistency in the government contracting field. In addition, in § 121.103(h)(5), SBA proposes to add language clarifying that for size purposes a concern must include in its revenues its proportionate share of joint venture receipts, or in its total number of employees its proportionate share of joint venture employees. A concern that was found to be affiliated through the "ostensible subcontractor" rule cannot, however, claim that because SBA found there to be a joint venture in effect for a particular contract it can exclude the receipts/employees of its subcontractor (*i.e.*, the ostensible subcontractor), which SBA deemed to be a joint venturer. SBA will exclude the proportionate share of receipts/employees only of true joint venture partners.

SBA is considering another change to the joint venture regulation, as well. SBA's regulations allow joint ventures to be considered small for larger procurements when certain requirements are met. *See* § 121.103(f)(3). In general, SBA regards joint ventures as short term relationships, which enable two or more concerns to enter into a business relationship to perform a specific contract. SBA is considering adopting a rule that would allow two or more small businesses to form a joint venture relationship that would go beyond a specific contract and still afford them the exclusion from affiliation (if the other requirements are met). In other words, the joint venture could be an ongoing relationship that would allow the concerns to seek out several different larger contract opportunities and still get an exclusion from affiliation without requiring the entities to form a separate joint venture for each contract opportunity. SBA is specifically requesting comments on this proposal.

SBA proposes several changes to § 121.104, which pertain to how the annual receipts of a concern are calculated. On January 31, 1996, SBA amended its size regulations to simplify

the method by which it determines average annual receipts (aar). Under the current regulations, SBA bases its calculation of a concern's aar solely on information contained in the concern's Federal income tax returns over its last three completed fiscal years. 61 FR 3280 (January 31, 1996). Previously, SBA could rely either on a concern's regular books of account or Federal income tax returns to determine a concern's aar. That policy change was made by SBA in an effort to simplify its size regulations by using the information a business concern reports to the Internal Revenue Service (IRS) for tax purposes to determine the annual receipts of a concern. The 1996 revisions also deleted SBA's requirement that a concern whose small business size status had been protested had to restate its receipts based on the accrual method of accounting if its books of account or tax returns were prepared using a different method of accounting. Since 1996, a number of issues have arisen concerning that revision and SBA now believes the public would benefit from additional regulatory guidance on these matters. In addition, OHA has rendered several significant rulings relating to the calculation of annual receipts and SBA believes these rulings should be codified in SBA's size regulations so the public is aware of them.

Thus, SBA is proposing to modify its definition of receipts in § 121.104(a)(1). This modification would identify the items on a Federal tax return that are to be used to calculate receipts. Currently, the regulation states that receipts consist of "total income" and "gross income" plus the "cost of goods sold." Although these terms as defined by the IRS include income from all sources, SBA has received comments from some businesses stating that certain types of income not explicitly specified in the regulations could be excluded in determining receipts. To eliminate any such misinterpretation, SBA is proposing to remove the words "total income" and "gross income" and add in their place "gross receipts," "gross sales," and "other income." This change in terminology merely lists the items on a Federal tax return that comprise all or part of total or gross income. In addition, SBA is proposing a revision to the definition of receipts to include interest, dividends, rents and royalties received by partnerships, S corporations, and sole proprietorships. For corporations, income from these sources is included in total income as reported on IRS Form 1120. However, for partnerships and S corporations, these items are reported separately from

total income on Schedule K of IRS Form 1165 and 1120S, respectively, and on Schedule C or S of IRS Form 1040 for sole proprietorships. Business entities such as limited liability corporations (LLCs) can elect the tax entity (partnership, corporation, or disregarded entity) that best suits their need. This is often referred to as "check the box." *See* 26 CFR 301.7701-3 (located at <http://www.access.gpo.gov/nara/cfr/cfr-retrieve.html#page1>) and IRS Form 8832 (located at http://www.irs.gov/forms_pubs/forms.html). To be consistent with the corporate tax return, and to continue SBA's long-standing policy of including income from all sources in its definition of receipts, SBA proposes to revise § 121.104(a)(1) to specifically include these sources of income in the definition of receipts.

SBA also proposes to expand its exclusion of receipts received by an agent for another. The existing regulation allows this exclusion only for agents specifically identified in the regulation, such as a travel agent. While the proposed regulation would continue to list those agency-type business entities for which amounts collected for another would be excluded, it would also permit SBA to find a similar agent-type situation to be equally excluded. SBA's concern is that this provision be applied consistently. Thus, SBA would exclude amounts collected for another only when a specific type of business (or industry) demonstrates that that is the practice in the industry. SBA would not exclude amounts based on specific facts of one business entity. This revision will eliminate the need to conduct a separate study and rulemaking to expand the list of agents that can exclude amounts they receive for another and apply a general principle in the case of agents.

Finally, SBA would also clarify this section to state that the only exclusions from the definition are those specifically provided for in the section and that all other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts. *See, e.g., Size Appeal of Uniband, Inc.*, SBA No. SIZ-4326 (1998); *Size Appeal of Aliron International, Inc.*, SBA No. SIZ-4317 (1998).

Proposed § 121.104(a)(1) would provide that the Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern, and that SBA will not consider tax returns or

amendments filed with the IRS after the initiation of a size determination. This proposed change would preclude a concern that is the subject of a size protest from providing revised Federal tax returns to SBA while a size determination or appeal is pending. If SBA were to accept amended tax returns prepared after initiation of a size determination, SBA would constantly be re-evaluating cases that had already been completed or that were substantially prepared. This would invariably lead to delays in the size determination process and, in the case of pending procurements, delays in contract award. A business concern is expected to base its small business self-certification on information existing at that time. This rule is in accord with OHA rulings that size status must be based on documents in existence and available as of the date of self-certification. *See, e.g., Size Appeal of MTB Investments, Inc.*, SBA No. SIZ-4239 (1997); *Size Appeals of J.L. Associates, Inc. and HLJ Management Group, Inc.*, SBA No. SIZ-3102 (1988). Where a concern is determined to be other than small, but legitimately erred in reporting its income on its Federal tax returns, it could subsequently request recertification as a small business from SBA based on amendments filed with the IRS. SBA then would be able to conduct a review of the amended returns without delaying the size determination or the Federal procurement process.

Proposed § 121.104(a)(2) would cover situations where a concern has not filed a Federal income tax return for one or more of its most recently completed three fiscal years. This proposed regulation is intended to codify OHA's ruling in *Size Appeal of Troy Systems, Inc.*, SBA No. SIZ-4296 (1998). In that appeal, a concern had not filed a Federal income tax return for its most recently completed fiscal year at the time it self-certified as small. The appellant argued that because the tax return was not available, it did not have to submit any information for that year. OHA rejected that argument. The proposed rule provides that in such a situation, SBA may use any other information that is available, such as an audited financial statement or affidavit from the concern's accountant or chief financial officer.

Section 121.104(b)(3) is the formula SBA uses to determine annual receipts when the concern has a "short year" (as defined by the IRS) as one of the years within the period of measurement. The proposed rule would not change the substance of the formula. It would

merely clarify the language for ease of use.

Section 121.104(d) applies to the annual receipts of a concern's affiliates and requires the inclusion of an affiliate's receipts during the entire period of measurement, not just the period after affiliation arose. This rule has existed for many years and SBA proposes to simply clarify the language.

Section 121.106 addresses how SBA counts a concern's number of employees. SBA proposes to amend § 121.106(a) to clarify that SBA may utilize the same criteria used by the IRS for Federal income tax purposes in determining whether individuals are employees. *See, e.g., IRS Publication 15A, "Employer's Supplemental Tax Guide"* (located at http://www.irs.gov/forms_pubs/forms.html), which provides guidance on whether a person is a common-law employee, a statutory employee, a statutory nonemployee, or an independent contractor. In addition, SBA's proposed amendment states that it considers "leased" employees to be employees of the concern. The proposed rule continues to direct SBA to consider the totality of the circumstances when determining whether certain individuals are to be considered employees of the concern in question. This "totality of the circumstances" language stems from SBA Size Policy Statement No. 1, published in the **Federal Register** on February 20, 1986, 51 FR 6099, and that Size Policy Statement continues to have effect.

Further, SBA proposes to amend § 121.106(b)(4) by explicitly describing how employees of affiliates and former affiliates are treated, rather than simply referring to the manner in which annual receipts of affiliates and former affiliates are treated in § 121.104.

SBA also proposes to revise Footnote 14 to the Table of Small Business Size Standards by NAICS Industry in § 121.201. Specifically, the proposed revisions to Footnote 14(b) adds language to clarify that a Federal procurement involving a range of environmental services to restore a contaminated environment does not need to include remedial action as one of three activities to be classified under this size standard. SBA has learned that some Federal agencies have interpreted this footnote to require remedial action to be part of the procurement before it will classify the procurement under "Environmental Remediation Services." This was not the intention of SBA when it established the size standard. SBA intended this size standard to apply to large scale, multi-disciplined procurements involving environmental remediation. To be classified under

Environmental Remediation Services, a procurement must satisfy two requirements. First, the general purpose of the procurement is to restore a contaminated environment. Second, the procurement requires tasks to be performed in a range of activities which can be classified in three or more NAICS industries, or sub-industries which have separate size standards, and that no industry or sub-industry accounts for 50 percent or more of the procurement. The statement "the general purpose of the procurement must be to restore a contaminated environment" was intended to mean that the procurement would be associated with environment remediation by performing a range of activities that would contribute to the eventual cleanup of a site. To clarify SBA's intent, the footnote is revised by stating "the general purpose of the procurement must be to restore or directly support the restoration of a contaminated environment * * *." Also, added is a list of activities usually associated with environmental remediation and related activities. This language makes clear that a procurement involving several activities, all in separate NAICS codes, that directly contribute to the eventual cleanup of a contaminated environment can be classified under this size standard, even though another procurement would be awarded to perform the actual cleanup.

SBA proposes to eliminate the existing dual size standard that currently applies to applicants for SBA financial assistance (§ 121.301(a)), and replace it with a single size standard requirement. Under the current regulation, an applicant for financial or disaster assistance must be small under two size standards. An applicant, along with its affiliates, must be small for the size standard for the industry in which the applicant alone is primarily engaged, and for the industry in which the applicant along with its affiliates is primarily engaged. Since most applicants are small businesses well below SBA's size standards, they generally do not have extensive affiliation relationships with other business concerns. Thus, SBA believes a dual size standard requirement is not needed for these programs. SBA also believes that the wording of the dual size standard is not clear, and has caused confusion as to its proper application. For these reasons, SBA is proposing a single size standard requirement in which a business concern eligible for financial and disaster assistance is a concern that, combined with its affiliates, does not

exceed the size standard of the primary industry of the applicant concern alone.

Section 121.301(d)(1), which contains the size standard for surety bond guarantee assistance, would be amended by adding the words "together with its affiliates" to make it clear that the receipts of all affiliates must be included. This change is for clarity purposes only, as SBA always includes the receipts or employees of a concern's affiliates when determining the concern's size. SBA also proposes to revise § 121.301(e) to state that an applicant for financial assistance must use all of the assistance within a labor surplus area (LSA) in order to obtain the benefit of the 25% size standard differential. The current regulation does not clearly provide what percentage of work must be performed in an LSA. It has always been SBA's intent to require 100% of the assistance be used in an LSA in order to get the size differential, but a recent case has raised the question as to whether the regulation could be read to permit less than 100% of the assistance to be used in an LSA. This proposed change would clarify SBA's position in this regard.

Section 121.302 addresses when SBA determines the size status of an applicant for SBA financial assistance. The section would be amended to include a provision for financial assistance from a Small Business Investment Company (SBIC) licensee and from a New Markets Venture Capital Company.

Section 121.401, covering what procurement programs are subject to size determinations, would be amended for plain language purposes.

The proposed rule would amend the section heading for § 121.402 to read "What size standards are applicable to Federal Government Contracting programs?" In addition, SBA proposes to amend § 121.402(a) to state that a contracting officer (CO) must use the size standard in effect at the time the solicitation is issued. If SBA amends a size standard and it becomes effective after the solicitation is issued, then the CO would not be required to amend the solicitation and use the new size standard. However, the proposed regulation does note that if the size standard is amended and becomes effective before the date initial offers are due, the CO may modify the solicitation and use the new size standard. This has been a long-standing policy of SBA's, and SBA believes it should be specifically set forth in the regulations for clarity purposes.

Section 121.404 would be amended to add additional exceptions to the general rule that the size status of a concern is

determined as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price. Proposed § 121.404(a)(1) would provide that a concern applying to be certified as a Participant in SBA's 8(a) Business Development (8(a) BD) program, as a small disadvantaged business (SDB), or as a HUBZone small business must qualify as small as of the date of certification by SBA. This is not a change in SBA policy. SBA currently requires a concern to be small at the date of certification for these programs, but those regulatory requirements are contained in the program specific regulations only. The proposed rule would simply add those requirements to the size regulations as well. When requiring an 8(a) BD, HUBZone, or SDB applicant to be small for "its primary industry classification," the concern's primary industry classification is determined by looking solely at the applicant concern (*i.e.*, by excluding its affiliates), but the size of the concern is determined by including the receipts or employees of all affiliates.

Another new exception would apply to the case where a solicitation is modified so that initial offers are no longer responsive to the solicitation. In such a case, proposed § 121.404(a)(4) would provide that a concern must recertify that it is small at the time it submits a responsive offer which includes price to the modified solicitation. SBA believes that this makes sense and flows from existing SBA policy. If a solicitation changes drastically so that a previous offer would no longer be responsive, it is in effect a new solicitation. As such, a firm must certify its status as a small business with respect to the new solicitation.

The proposed rule would also add an exception for the subcontracting program. Under proposed § 121.404(a)(5), for subcontracting purposes, a concern must qualify as small as of the date that it certifies that it is small for the subcontract. The date of offers for or the award of the prime contract are not relevant to whether a concern is small for a subcontract. In addition, the applicable size standard would be the size standard in effect at the time the concern self-certifies that it is small for the subcontract, not the size standard that may have been in effect when the prime contract was awarded or otherwise.

The proposed rule would add a final exception applying to two-step sealed bidding under subpart 14.5 of the FAR, 48 CFR. Under two-step sealed bidding, the proposed rule would require that a

concern must qualify as small as of the date that it certifies that it is small as part of its step one proposal. SBA believes that it makes sense to establish size as of the date of the step one proposal in order to give certainty early on in the process who is and who is not eligible for such an award.

Proposed § 121.404(b) would specify that a concern that qualified as a small business at the time it receives a contract is considered to be a small business throughout the life of that contract. This is not a change in policy, but merely puts into the regulations SBA's long-standing position on this issue. Proposed § 121.404(c) covers the case where an existing contract is "renewed" by a procuring activity. SBA believes that the renewal of an existing contract is a term that is imprecisely used. Renewal should refer to a follow-on contract. In that case, the date at which size is determined is set by the general rule specified in § 121.404(a) (*i.e.*, the date that the concern submits a written self-certification that it is small to the procuring agency for the renewal contract). Sometimes the term "renewal" is incorrectly used where a procuring agency exercises an option. In that case, there is no new contracting action. The authority for the option relates back to the original contract. As set forth in proposed § 121.404(b), mentioned above, as long as a concern qualified as a small business at the time it receives a contract, it is considered to be a small business throughout the life of that contract. Therefore, a concern that was small at the time of award would always be considered a small business for purposes of any options relating to that contract. Proposed § 121.404(b) would specifically provide that where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business. SBA is, however, considering a rule which would place a limit on the amount of time a concern would be deemed a small business. Specifically, SBA is considering a separate rule making that would permit a procuring agency to treat a concern as a small business for no more than 5 years from the date of award.

Section 121.406(b)(1)(ii) would be amended to delete the requirement that a nonmanufacturer must normally sell the items being supplied to the general public. This rule was based on provisions of the Walsh-Healey Public Contracts Act, which permitted Federal acquisitions of supplies only from manufacturers or "regular dealers." One of the requirements for being a regular dealer was to sell items to the general

public. These provisions of the Walsh-Healey Act were repealed by the Federal Acquisition and Streamlining Act of 1994. SBA believes that requiring a firm to sell to the general public is overly restrictive. A firm may be a legitimate, viable business selling exclusively to government entities. SBA does not believe that a firm that sells only to the government should be excluded from being considered a small business just because it does not generally sell items to the general public. Therefore, so long as a firm normally sells the type of item either to public or private entities, it may qualify as a small business nonmanufacturer under SBA's size regulations. The proposed rule would also change the provision to require the concern to normally sell the same "type of item." The current regulation simply states that a concern must sell "the items" being supplied. SBA believes that the current provision could be read to be overly restrictive. Under the proposed rule, a firm would not need to have a track record of selling the exact item, but only items of the same type.

The proposed rule would also add clarifying language to § 121.406(b)(2) to explain what a firm that makes changes to an item and then resells it must do in order to qualify as an eligible small business manufacturer. The current regulation states that firms that perform only minimal operations upon the item being procured do not qualify as manufacturers. The proposed rule adds language, which states that "[f]irms that add substances, parts, or components to an existing end-item to modify its performance will not be considered the end-item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item." If a firm adds something to an item that the manufacturer of that existing item does not provide, the firm will be considered the manufacturer of the ultimate end item (*i.e.*, the item plus the addition). For example, if firm A manufactures a saw, the Government wants to purchase a saw with a safety switch, and firm B adds a safety switch to the saw, firm B, and not firm A, will be considered the manufacturer of the end item (*i.e.*, saw with safety switch) provided firm A does not itself make or provide a saw with safety switch. Similarly, a firm that merely installs a video card that the manufacturer of a computer could have installed will not be considered the manufacturer of computer.

Currently, under § 121.410, a business concern is small for purposes of a subcontract awarded by a Federal prime contractor if: (a) For subcontracts of

\$10,000 or less, the concern bidding on the subcontract has 500 or fewer employees averaged over each pay period of the previous year, or, (b) for subcontracts of more than \$10,000, the concern bidding on the subcontract is no larger than the size standard corresponding to the NAICS industry that best represents the scope of work of the subcontract.

This rule proposes to eliminate the 500-employee size standard provision for subcontracts of less than \$10,000 and require that the size standard of the NAICS industry that best matches the purpose of the subcontract be used. This change merely adopts the size standard policy now in effect for subcontracts of \$10,000 or greater.

SBA is proposing this change for two reasons. First, this proposed change makes the size standards requirements consistent for all prime Federal contracts and for subcontracts awarded by prime contractors. Under this policy, the small business status would not change depending on the size of a subcontract or whether the contract was awarded as a Federal prime contract or as a subcontract of a Federal prime contract. SBA is also concerned about inconsistencies of two-tiered subcontracting size standards. A prime contractor awarding a subcontract classified in a NAICS industry with a receipt-based size standard (primarily in the construction and service industries) will have a higher size standard associated with subcontracts of less than \$10,000 than the size standard for the same type of subcontract but valued over \$10,000. For example, a subcontract for analytical testing services falls under NAICS code 541620, Environmental Consulting Services, and SBA has established a size standard for this industry of \$6 million in average annual receipts. If the value of the subcontract is more than \$10,000, a small business is defined as one with \$6 million or less in average annual receipts. A firm of this size has about 60 to 70 employees. Yet, under the current regulations, a subcontract of less than \$10,000 allows firms of up to 500 employees to qualify as small businesses. SBA believes that one size standard should apply to the same type of subcontracts, regardless of their value.

Second, the two-tiered size standard based on the size of the subcontract is not widely known or followed by prime contractors and small businesses. SBA believes establishing a policy of having a consistent size standard requirement at the prime and subcontracting level is more desirable than retaining and educating the prime contractors and

subcontractors about two-tiered size standards. Most prime contractors verify the status of their small business subcontractors based on the size standard of the subcontractor's primary NAICS industry or based on the size standard of the prime contract. These methods for ascertaining the small business status of a subcontractor lead to an incorrect small business determination in many cases, since the subcontractor must be small based on the industry of the subcontract, which is not necessarily the same as the primary industry of the subcontractor or the industry of the prime contract. SBA believes that the proposed change reflects how most prime contractors have been administratively determining the small business status of their subcontractors. Enforcing the current two-tiered size standard regulation would in essence subject prime contractors to a different size standard requirement than generally being followed. Thus, change should have little if any impact.

SBA invites comments to the elimination of the two-tiered subcontracting size standards requirement. SBA also welcomes suggestions on other approaches to size standards for the Subcontracting Program. Alternative size standards should address how they would be an improvement over the current and proposed subcontracting size standards and how they best protect the interests of small business.

Section 121.411 would be amended by deleting the words "Procurement Automated Source System (PASS)" and substituting the words "Procurement Marketing & Access Network (PRO-Net)." PASS no longer exists and has been replaced by PRO-Net. PRO-Net is an online database of information on thousands of small businesses. PRO-Net serves as a search engine for contracting officers, a marketing tool for small companies, and a "link" to procuring opportunities and other important information.

Sections 121.601 through 121.604 would be changed by removing all references to "Minority Enterprise Development" and "MED" and substituting "8(a) Business Development" and "8(a) BD." SBA no longer uses the former terms.

The proposed rule would amend § 121.702(a) to recognize that for purposes of the SBIR program a joint venture is permitted where each entity to the venture is at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States. The current requirement does

not contain such an exception for joint ventures, and requires 51 percent direct ownership by individuals who are U.S. citizens or permanent resident aliens in every case. This change is being made to make the size regulations consistent with a recent change made to the SBIR Policy Directive.

SBA proposes to amend § 121.1001 entitled "Who may initiate a size protest or request a formal size determination?" Section 121.1001(a)(1)(i) presently allows "any offeror" to file a size protest in connection with a particular procurement or sale. The purpose of the proposed regulation is to give standing to those concerns whose successful challenge would enable them to compete for award. This section would be changed to provide that "any offeror whom the contracting officer has not eliminated for reasons unrelated to size" may file a protest. An offeror that has been eliminated for reasons unrelated to size would not be able to compete for award if the protest were successful, and, thus, should not have standing to question another firm's size status. This change would codify long-standing OHA precedent on this issue. *See, e.g., Size Appeal of Arcata Associates, Inc.*, SBA No. SIZ-3377 (1990).

The proposed rule would amend § 121.1001(a)(5)(iii) applying to protests under the SDB program to delete the reference to the Associate Administrator (AA) for MED, and substitute the SBA Associate Administrator for 8(a) Business Development. Section 121.1001(a)(6)(iv), applying to protests under the HUBZone program, would be changed to delete the reference to the AA for Government Contracting and substitute SBA's AA for the HUBZone program. Section 121.1001(a)(7)(3), applying to any unrestricted Government procurement in which status as a small business may be beneficial, would be changed by deleting the reference to the AA for MED and substituting the SBA AA for 8(a) BD.

The proposed rule would add new paragraphs (b)(7), (b)(8) and (b)(9) to § 121.1001 to authorize SBA program personnel to request formal size determinations regarding a firm's status as small for SDB certification, HUBZone certification, and being listed as a small business on PRO-Net, respectively.

SBA proposes to add a new § 121.1004(a)(4) to cover instances where notification of contract award is posted on the Internet, as authorized under Simplified Acquisition Procedures (SAP). In such cases, SBA proposes that a size protest must be made to the contracting officer within five business days after the electronic

posting. SBA also proposes to add a new § 121.1004(a)(5) that would provide that where no written notification is required, either prior to or at the time of award, a protest will be considered timely if filed within five days after receipt of verbal notification from the contracting officer or other agency representative. Under SAP, there is no requirement for the contracting officer to provide either pre-award or award notification to unsuccessful offerors. Consequently, the date of verbal notification or date of posting on the internet will be considered the start of the 5-day period allotted for a timely size protest. There may be other instances where there is no notice provided (*e.g.*, award of a task order under a schedule contract), and this provision would apply there as well.

SBA proposes to amend § 121.1007 containing the requirement that a size protest must allege specific facts by restoring the six examples that were formerly found at § 121.1604(a) (1995). SBA has received comments that these examples were helpful in determining whether or not a particular protest satisfies the specificity requirement.

The proposed rule would amend § 121.1008, describing what occurs after SBA receives a size protest or request for formal size determination. The proposed rule would require the SBA Government Contracting Area Director to notify SBA's AA/8(a) BD, if a protest involves the size status of a concern that SBA has certified as a small disadvantaged business, and notify the appropriate SBA district office, if a protest pertains to the apparent successful offeror on a requirement that has been reserved for competition among eligible 8(a) Participants. Section 121.1008(d) would be amended by adding a sentence requiring a concern whose size status is at issue to furnish information about its alleged affiliates to SBA, notwithstanding any third party claims of privacy or confidentiality, because SBA does not disclose information obtained in the course of a size determination except as permitted by Federal law. This is intended to codify several OHA rulings. *See, e.g., Size Appeal of Donovan Travel, Inc., d/b/a Carlson Wagonlit Travel*, SBA No. SIZ-4270 (1997); *Size Appeal of Quantrad Sensor, Inc.*, SBA No. SIZ-4255 (1997).

The proposed rule would add clarifying language to § 121.1009(b), "Basis for determination." Section 121.1009(g), "Results of an SBA Size Determination," would be amended by making it clear that contract award may be made based on a formal size determination by a SBA Government

Contracting Area Director. It would also be amended to provide that an OHA decision on appeal will apply to the pending acquisition or sale if the decision is received before award. OHA decisions received after contract award will not apply to that acquisition or sale unless the contracting officer agrees to apply the OHA decision to that acquisition or sale.

The proposed rule would amend § 121.1101 by adding a new second paragraph providing that OHA will not review a formal size determination where the contract has been awarded and the issues raised in a petition for review are contract specific, such as compliance with the nonmanufacturer rule or joint venture/ostensible subcontractor rule. This change would conform the size appeal regulation to the re-certification regulation at § 121.1010(b) and codify long-standing OHA rulings. *See, e.g., Size Appeal of Lightcom International, Inc.*, SBA No. SIZ-4118 (1995).

Currently, § 121.1103 simply states that the procedures for NAICS code appeals are contained in section 19.303 of the Federal Acquisition Regulation (FAR), 48 CFR 19.303. SBA proposes to amend this section by setting forth in detail the specific procedures for NAICS code appeals rather than referring the reader to the FAR. The procedures set forth do not differ from those currently in the FAR.

Section 121.1205 would be amended by stating that a list of classes of products for which waivers of the Nonmanufacturer Rule have been granted may be obtained on SBA's Web site at www.sba.gov/GC/approved.html. 13 CFR part 134 contains rules of procedure governing cases before OHA, including size appeals and former SIC (now NAICS) code appeals. SBA is proposing several amendments to part 134, mainly to conform to the changes being proposed for part 121.

13 CFR 134.102 sets forth OHA's jurisdiction. The proposed rule would amend paragraph (k) to authorize an affected party to appeal a determination by the SBA Government Contracting Area Office as to whether two or more concerns are affiliated for purposes of SBA's financial assistance programs, or other programs for which an affiliation determination was requested. SBA financial assistance personnel may seek assistance from a Government Contracting Area Office in determining whether a loan applicant is affiliated with one or more other business entities. This may not be a "formal size determination" in the normal sense because the concerns even if affiliated may still qualify as small. However, this

determination is necessary in order to determine whether the borrower, including the borrower's affiliates, has exceeded the \$750,000 loan limit amount set forth in § 120.151 of this chapter. If the Area Office finds affiliation such that the borrower is determined to be ineligible to receive additional loan amounts, the firm may not currently appeal that determination to OHA as it is not a "formal size determination." This change would permit such an appeal.

Section 134.314 would be amended by adding a provision that the appellant has the burden of proof, by a preponderance of the evidence, in both size and NAICS code designations. This provision was formerly in the size regulations (*see* § 121.1707 (1995)), and since its deletion from the regulations, OHA has adopted this premise in its rulings. *See, e.g., Size Appeal of Rebmar, Inc.*, SBA No. SIZ-4173 (1996); *SIC Appeal of The Scientific Consulting Group, Inc.*, SBA No. SIZ-4186 (1996). SBA believes that it is appropriate to restore the provision to the regulations.

Finally, SBA proposes amending § 134.316(a) to state that an OHA judge will decline to decide substantive issues not properly raised on appeal, or which are abandoned, or have become moot. This would codify OHA precedent. *See e.g., Size Appeal of Lightcom International Inc.*, SBA No. SIZ-4118 (1995), *Size Appeal of Infotec Development, Inc.*, SBA No. SIZ-4197 (1996).

Compliance With Executive Orders 12612, 12988, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

OMB has determined that this proposed rule does not constitute a "significant regulatory action" under Executive Order 12866. This rule would clarify SBA's procedural and definitional size rules. As such, the rule would have no effect on the amount or dollar value of any Federal contract requirements or of any financial assistance provided through SBA. Therefore, the rule is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy. In addition, the proposed rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of such recipients, nor raise novel legal or

policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this rule, if adopted in final form, would not impose new reporting or record keeping requirements.

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order.

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

SBA has determined that this proposed rule, if adopted in final form, will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Although the rule amends several definitions concerning the size of a business concern, the majority of these amendments are clarification of current policy.

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 134

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

For the reasons set forth in the supplementary information, SBA proposes to amend parts 121 and 134 of Title 13, Code of Federal Regulations, as follows:

PART 121

1. The authority citation for 13 CFR 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. Amend § 121.102 by adding a new paragraph (e) to read as follows:

§ 121.102 How does SBA establish size standards?

* * * * *

(e) SBA's Size Policy Board considers and makes recommendations to the Administrator relating to improvements in SBA regulations, procedures, and policy concerning size matters, including size standards.

3. Amend § 121.103 as follows:

- a. Revising the heading;
- b. Revising (a)(1), (3), (4), and adding new paragraphs (a)(5) and (a)(6);
- c. Revising the heading of paragraph (b);
- d. Revising paragraph (b)(2);
- e. Adding a new sentence to the end of paragraph (b)(6);
- f. Revising paragraphs (c), (d), and (e);
- g. Redesignating paragraph (f) as paragraph (h), and amending newly redesignated paragraph (h) by revising the introductory text, (h)(1), (h)(2), (h)(3), heading, (h)(3)(i), introductory text, (h)(3)(i)(B)(1), (h)(3)(ii), and (h)(4);
- h. Redesignating paragraph (g) as (i); and
- i. Adding new paragraphs (f) and (g).

The revisions and additions read as follows:

§ 121.103 How does SBA determine affiliation?

(a) *General Principles of Affiliation.*

(1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) * * *

(3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

(4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.

(5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

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

(b) *Exceptions to affiliation coverage.*

(1) * * *

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

entities because of their common ownership or common management. Affiliation may be found for other reasons.

* * * * *

(6) * * * Affiliation may be found for other reasons.

(c) *Affiliation based on stock ownership.* (1) A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern.

(2) If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

(3) If a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the concern's Board of Directors and CEO or President will be deemed to have the power to control the concern in the absence of evidence to the contrary.

(d) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* (1) In determining size, SBA considers stock options, convertible debentures, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, debentures, and agreements as though the rights granted have been exercised.

(2) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and are thus not given present effect.

(3) Options, debentures, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, remote, or unenforceable under state or Federal law are not given present effect.

(4) An individual or concern that controls one or more other concerns cannot use options, debentures, or agreements to appear to terminate such control before actually doing so.

(e) *Affiliation based on common management.* Affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.

(f) *Affiliation based on identity of interest.* Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

(g) *Affiliation based on the newly organized concern rule.* Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns.

(h) *Affiliation based on joint ventures or teaming arrangements.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out a single specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. A joint venture is viewed as a business entity in determining power to control its management. A teaming arrangement for affiliation purposes is one in which two or more companies form a partnership or joint venture to act as a potential prime contractor. Affiliation may also be found between a potential prime contractor and its intended subcontractor pursuant to paragraph (h)(4) of this section.

(1) Parties to a joint venture or teaming arrangement are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture or teaming arrangement.

(2) Except as provided in paragraph (h)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers or teaming arrangement partners are affiliated with each other with regard to the performance of that contract.

(3) *Exception to affiliation for certain joint ventures and teaming arrangements.* (i) A joint venture or teaming arrangement of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (h) of this section so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

(A) * * *

(B) * * *

(1) For a procurement having a receipts based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

* * * * *

(ii) A joint venture or teaming arrangement of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation under paragraph (h) of this section so long as the requirements of § 124.513(b)(1) of this chapter are met.

(iii) * * *

(4) A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

(5) For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees.

* * * * *

4. Revise § 121.104 to read as follows:

§ 121.104 How does SBA calculate annual receipts?

(a) *Receipts* means gross receipts, gross sales, interest, dividends, rents, royalties and other income as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts received in trust as an agent on behalf of another, in which the agent does not have a claim of right to such monies and the amounts do not increase the agent's asset base (such as a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker). For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.

(1) The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information

contained in an affidavit by a person with personal knowledge of the facts.

(b) *Completed fiscal year* means a taxable year including any short year. "Taxable year" and "short year" have the meanings attributed to them by the IRS.

(c) *Period of measurement.* (1) Annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.

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

(3) Where a concern has been in business three or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52.

(d) *Annual receipts of affiliates.* (1) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status includes the receipts of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose. Receipts are determined for the concern and its affiliates in accordance with paragraph (c) of this section even though this may result in using a different period of measurement to calculate an affiliate's annual receipts.

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

5. Revise § 121.106(a) and (b)(4) to read as follows:

§ 121.106 How does SBA calculate number of employees?

(a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality

of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

(b) * * *

(4)(i) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(ii) The employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

6. In § 121.201, revise paragraph (b) of footnote 14 to the Table of Small Business Size Standards by NAICS Industry to read as follows:

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

* * * * *

Footnotes

* * * * *

14. *NAICS 562910—Environmental Remediation Services:*

(a) * * *

(b) For purposes of classifying a Government procurement as Environmental Remediation Services, the general purpose of the procurement must be to restore or directly support the restoration of a contaminated environment (such as, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, remediation services, containment, removal of contaminated materials, storage of contaminated materials or security and site closeouts) and also the procurement must be composed of activities in three or more separate industries with separate NAICS codes or, in some instances (*e.g.*, engineering), smaller sub-components of NAICS codes with separate, distinct size standards. These activities may include, but are not limited to, separate activities in industries such as: Heavy Construction; Special Trade Construction; Engineering Services; Architectural Services; Management Consulting Services; Hazardous and Other Waste Collection; Remediation Services, Testing Laboratories; and Research and Development in the Physical, Engineering and Life Sciences. If any activity in the procurement can be identified with a

separate NAICS code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard is the one for that particular industry, and not the Environmental Remediation Service size standard.

* * * * *

7. Amend § 121.301 by revising paragraphs (a), (d)(1) and (e) to read as follows:

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

(a) For Business Loans and Disaster Loans (other than physical disaster loans), an applicant, including its affiliates, must not exceed the size standard for the industry in which the applicant is primarily engaged.

* * * * *

(d) * * *

(1) Any construction (general or special trade) concern or concern performing a contract for services is small if, together with its affiliates, its average annual receipts does not exceed \$6.0 million.

* * * * *

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

8. Amend § 121.302 by revising paragraph (a), redesignating paragraph (d) as paragraph (e), revising newly redesignated paragraph (e), and adding the following new paragraph (d) to read as follows:

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

(a) The size status of an applicant for SBA financial assistance is determined as of the date the application for financial assistance is accepted for processing by SBA, except for the Preferred Lenders program, the Disaster Loan program, the SBIC program, and the New Markets Venture Capital program.

* * * * *

(d) For financial assistance from an SBIC licensee or a New Markets Venture Capital Company, size is determined as of the date a concern's application is accepted for processing by the SBIC or the New Markets Venture Capital Company.

(e) Changes in size after the applicable date when size is determined will not disqualify an applicant for assistance.

9. Revise the heading of § 121.305 to read as follows:

§ 121.305 What size eligibility requirements exist for obtaining financial assistance relating to particular procurements?

* * * * *

10. Revise § 121.401 to read as follows:

§ 121.401 What procurement programs are subject to size determinations?

The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program, SBA's Certificate of Competency program, the Very Small Business program, SBA's 8(a) Business Development program, SBA's HUBZone program, the Small Business Subcontracting program, and the Federal Small Disadvantaged Business (SDB) program.

11. Amend § 121.402 by revising the heading and paragraph (a), and by adding a new sentence to the end of paragraph (b) to read as follows:

§ 121.402 What size standards are applicable to Federal Government Contracting programs?

(a) A concern must not exceed the size standard for the NAICS code specified in the solicitation. The contracting officer must specify the size standard in effect on the date the solicitation is issued. If SBA amends the size standard and it becomes effective before the date initial offers (including price) are due, the contracting officer may amend the solicitation and use the new size standard.

(b) * * * Procurements for supplies must be classified under the appropriate manufacturing NAICS code, not under the wholesale trade NAICS code.

* * * * *

12. Revise § 121.404 to read as follows:

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

(a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price. The following are the only exceptions to this rule:

(1) A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a small disadvantaged business (under part 124, subpart B, of this chapter), or as a

HUBZone small business (under part 126 of this chapter) must qualify as a small business for its primary industry classification as of the date of certification by SBA.

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

(3) Size status for purposes of compliance with the nonmanufacturer rule set forth in § 121.406(b)(1) and the ostensible subcontractor rule set forth in § 121.103(f)(4) is determined as of the date of the best and final offer.

(4) Where a solicitation is modified so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price to the modified solicitation.

(5) For subcontracting purposes, a concern must qualify as small as of the date that it certifies that it is small for the subcontract. The applicable size standard is that set forth in § 121.410 that is in effect at the time the concern self-certifies that it is small for the subcontract.

(6) For purposes of two-step sealed bidding under subpart 14.5 of the FAR, 48 CFR, a concern must qualify as small as of the date that it certifies that it is small as part of its step one proposal.

(b) A concern that qualified as a small business at the time it receives a contract is considered to be a small business throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business.

(c) A follow-on or renewal contract is a new contracting action. As such, size is determined as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price for the follow-on or renewal contract.

13. Amend § 121.406 by revising paragraph (b)(1)(ii) and by adding a new sentence in paragraph (b)(2) after the fifth sentence to read as follows:

§ 121.406 How does a small business concern qualify to provide manufactured products under small business set-aside or 8(a) contracts?

* * * * *

(b) *Nonmanufacturers.* (1) * * *

(ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied; and

* * * * *

(2) * * * Firms that add substances, parts, or components to an existing end-item to modify its performance will not

be considered the end-item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item. * * *

14. Revise § 121.410 to read as follows:

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

For subcontracting purposes pursuant to sections 8(d) of the Small Business Act, a concern is small for subcontracts which relate to Government procurements if it does not exceed the size standard for the NAICS code that best describes the product or service being acquired by the subcontract. However, subcontracts for engineering services awarded under the National Energy Policy Act of 1982 have the same size standard as Military and Aerospace Equipment and Military Weapons under NAICS 541213.

15. In § 121.411(a), remove the words "Procurement Automated Source System (PASS)" and add the words "Procurement Marketing & Access Network (PRO-Net)."

16. The undesignated center heading before § 121.601 is revised to read as follows:

SIZE ELIGIBILITY REQUIREMENTS FOR THE 8(A) BUSINESS DEVELOPMENT PROGRAM

17. Revise § 121.601 to read as follows:

§ 121.601 What is a small business for purposes of admission to SBA's 8(a) Business Development program?

An applicant must not exceed the size standard corresponding to its primary industry classification in order to qualify for admission to SBA's 8(a) Business Development Program.

§ 121.602 [Amended]

18. In § 121.602 replace the acronym "MED" in the heading and the text with the words "8(a) BD."

§ 121.603 [Amended]

19. In § 121.603 replace the acronym "MED" in the heading and in paragraphs (a), (b) and (d) with the words "8(a) BD."

§ 121.604 [Amended]

20. In § 121.604 replace the acronym "MED" in the heading and the text with the words "8(a) BD."

21. Section 121.702(a) is revised to read as follows:

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

* * * * *

(a) is at least 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States, except in the case of a joint venture, where each entity to the venture must be 51 percent owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States;

* * * * *

22. Amend § 121.1001 by revising paragraphs (a)(1), (a)(2)(i), (a)(5)(i) and (iii), (a)(6)(i) and (iv), and (a)(7), introductory text, and (a)(7)(iii), and by adding new paragraphs (b)(1)(iii), (b)(7), (b)(8), and (b)(9) as follows:

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

(a) Size Status Protests. (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to small business or a particular group of small business, the following entities may file a size protest in connection with a particular procurement, sale or order:

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

* * * * *

(2) * * *

(i) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

* * * * *

(5) * * *

(i) Any offeror for the specific SDB requirement whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) * * *

(iii) The responsible SBA Area Director for Government Contracting, the SBA Associate Administrator for Government Contracting, or the SBA Associate Administrator for 8(a) Business Development;

(6) * * *

(i) Any concern that submits an offer for a specific HUBZone set-aside procurement that the contracting officer has not eliminated for reasons unrelated to size;

* * * * *

(iv) The SBA Associate Administrator for the HUBZone Program, or designee.

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

entities may protest in connection with a particular procurement:

* * * * *

(iii) The responsible SBA Area Director for Government Contracting, the SBA Associate Administrator for Government Contracting, or the SBA Associate Administrator for 8(a) Business Development.

(b) * * * (1) * * *

(iii) The SBA Associate Administrator for Investment or designee may request a formal size determination for any purpose relating to the Small Business Investment Company (SBIC) program (see part 107 of this chapter). A formal size determination includes a request to determine whether or not affiliation exists between two or more entities for any purpose relating to the SBIC program.

* * * * *

(7) In connection with initial or continued eligibility for the Small Disadvantaged Business (SDB) program, the following may request a formal size determination:

(i) The applicant or SDB concern; or

(ii) The Assistant Administrator of the Division of Program Certification and Eligibility or the Associate Administrator for 8(a)BD.

(8) In connection with initial or continued eligibility for the HUBZone program, the following may request a formal size determination:

(i) The applicant or HUBZone concern; or

(ii) The Associate Administrator for the HUBZone program, or designee.

(9) For purposes of validating that firms listed in SBA's PRO-Net database are small, the Government Contracting Area Director may initiate a formal size determination when sufficient information exists that calls into question a firm's small business status. The current date will be used to determine size, and SBA will remove from the database any firm found to be other than small.

23. In § 121.1004 add new paragraphs (a)(4) and (a)(5) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) * * *

(4) Electronic notification of award.

Where notification of award is made electronically, such as posting on the Internet under Simplified Acquisition Procedures, a protest must be received by the contracting officer before close of business on the fifth day, exclusive of Saturdays, Sundays, and legal holidays, after the electronic posting.

(5) No notice of award. Where there is no requirement for written pre-award notice or notice of award, or where the

contracting officer has failed to provide written notification of award, the 5-day protest period will commence upon oral notification by the contracting officer or authorized representative of the identity of the apparent successful offeror.

* * * * *

24. Revise the first sentence of § 121.1005 to read as follows:

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

A protest must be delivered to the contracting officer by hand, telegram, mail, FAX, Federal Express or other overnight delivery service, e-mail, or telephone. * * *

25. Amend § 121.1007 by adding the following examples after paragraph (c):

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

* * * * *

Example 1: An allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is unspecific.

Example 2: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

Example 3: An allegation that concern X is affiliated with concern Y without setting forth any basis for the allegation is unspecific.

Example 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.

Example 5: An allegation that concern X has revenues in excess of \$5 million (where \$5 million is the applicable size standard) without setting forth a basis for the allegation is unspecific.

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is \$5 million) because it received Government contracts in excess of \$5 million last year is sufficiently specific.

26. In § 121.1008, revise the heading and paragraphs (a) and (d) to read as follows:

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

(a) When SBA receives a size protest, the SBA Area Director for Government Contracting, or designee, will notify the contracting officer, the protested concern, and the protestor that the protest has been received. If the protest pertains to a requirement involving SBA's HUBZone program, the Area Director will also notify the AA/HUB of the protest. If the protest pertains to a requirement involving SBA's SBIR

Program, the Area Director will also notify the Assistant Administrator for Technology. If the protest involves the size status of a concern that SBA has certified as a small disadvantaged business (SDB) (see part 124, subpart B of this chapter) the Area Director will notify SBA's AA/8(a) BD. If the protest pertains to a requirement that has been reserved for competition among concerns that participate in SBA's 8(a) BD Program, the Area Director will notify the SBA district office servicing the 8(a) concern whose size status has been protested. SBA will provide a copy of the protest to the protested concern together with SBA Form 355, Application for Small Business Size Determination, by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt. SBA will ask the protested concern to complete the form and respond to the allegations in the protest.

* * * * *

(d) If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

27. In § 121.1009 revise paragraphs (b) and (g) to read as follows:

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

* * * * *

(b) *Basis for determination.* The size determination will be based primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue. The determination, however, may also be based on grounds not raised in the protest or request for size determination. SBA may use other information and may make requests for additional information to the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties.

* * * * *

(g) *Results of an SBA size determination.* (1) A formal size determination becomes effective immediately and remains in full force

and effect unless and until reversed by OHA.

(2) A contracting officer may award a contract based on SBA's formal size determination.

(3) If the formal size determination is appealed to OHA, the OHA decision on appeal will apply to the pending procurement or sale if the decision is received before award. OHA decisions received after contract award will not apply to that procurement or sale, but will have future effect, unless the contracting officer agrees to apply the OHA decision to the procurement or sale.

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

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

* * * * *

28. Revise § 121.1101 to read as follows:

§ 121.1101 Are formal size determinations subject to appeal?

(a) Appeals from formal size determinations may be made to OHA. Unless an appeal is made to OHA, the size determination made by a SBA Government Contracting Area Office or Disaster Area Office is the final decision of the agency. The procedures for appealing a formal size determination to OHA 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.

(b) OHA will not review a formal size determination where the contract has been awarded and the issue(s) raised in

a petition for review are contract specific, such as compliance with the nonmanufacturer rule (*see* § 121.406(b)), or joint venture or ostensible subcontractor rule (*see* § 121.103(h)).

29. Revise § 121.1103 to read as follows:

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

(a) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. The only exception is that, for a sole source contract reserved under SBA's 8(a) Business Development program (*see* part 124 of this chapter), only SBA's Associate Administrator for 8(a) Business Development may appeal the NAICS code designation.

(b) The contracting officer's determination of the applicable NAICS code is final unless appealed as follows:

(1) An appeal from a contracting officer's NAICS code designation and applicable size standard must be served and filed within 10 calendar days after the issuance of the initial solicitation. OHA will summarily dismiss an untimely NAICS code appeal.

(2)(i) The appeal petition must be in writing and must be sent to the Office of Hearings & Appeals, U.S. Small Business Administration, 409 3rd Street, SW., Suite 5900, Washington, DC 20416.

(ii) There is no required format for a NAICS code appeal, but an appeal must include the following information: the solicitation or contract number; the name, address, and telephone number of the contracting officer; a full and specific statement as to why the NAICS code designation is erroneous, and argument in support thereof; and the name, address and telephone number of the appellant or its attorney.

(3) The appellant must serve the appeal petition upon the contracting officer who assigned the NAICS code to the acquisition and SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 3rd Street, SW., Washington, DC 20416.

(4) Upon receipt of a NAICS code appeal, OHA will notify the contracting officer by notice and order of the date OHA received the appeal, the docket number, and the Judge assigned to the case. The contracting officer's response to the appeal must include argument and supporting evidence (*see* part 134, subpart C, of this chapter) and must be received by OHA within 10 calendar days from the date of the docketing notice and order, unless otherwise specified by the Judge. Upon receipt of OHA's docketing notice and order, the contracting officer must immediately

send to OHA a copy of the solicitation relating to the NAICS code appeal.

(5) After close of the record, OHA will issue a decision and inform all interested parties, including the appellant and contracting officer. If OHA's decision is received by the contracting officer before the date offers are due, the solicitation must be amended if the contracting officer's designation of the NAICS code is reversed. If OHA's decision is received by the contracting officer after the due date of initial offers, the decision will not apply to the pending procurement, but will apply to future solicitations for the same products or services.

30. Revise § 121.1205 to read as follows:

§ 121.1205 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers of the Nonmanufacturer Rule have been granted is maintained in SBA's website at www.sba.gov/GC/approved.html. A list of such waivers may also be obtained by contacting the Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or the nearest SBA Government Contracting Area Office.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

31. The authority citation for 13 CFR part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), and 637(a).

32. Revise § 134.102(k) to read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(k) Appeals from size determinations and NAICS code designations under part 121 of this chapter. "Size determinations" include decisions by Government Contracting Area Directors that determine whether two or more concerns are affiliated for purposes of SBA's financial assistance programs, or other programs for which an appropriate SBA official requested an affiliation determination;

* * * * *

33. In § 134.314, revise the heading and add the following sentence at the end to read as follows:

§ 134.314 Standard of review and burden of proof.

* * * The appellant has the burden of proof, by a preponderance of the evidence, in both size and NAICS code appeals.

34. Amend § 134.316(a) by adding the following sentence at the end to read as follows:

§ 134.316 The decision.

(a) * * * The Judge will not decide substantive issues raised for the first time on appeal, or which have been abandoned or become moot.

* * * * *

Dated: November 8, 2002.

Hector V. Barreto,
Administrator.

[FR Doc. 02-29272 Filed 11-21-02; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[Notice No. 963]

RIN 1512-AC72

Bennett Valley Viticultural Area (2002R-009T)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms (ATF) has received a petition proposing the establishment of the Bennett Valley viticultural area in Sonoma County, California. The petitioned area consists of approximately 8,140 acres of valley and upland terrain, with 650 acres currently planted to grapes. The proposed area is within the established Sonoma Valley viticultural area, except for a 281-acre overlap into the Sonoma Coast viticultural area. A portion of the proposed area also overlaps the Sonoma Mountain viticultural area, which is itself totally within the larger Sonoma Valley viticultural area.

DATES: Written comments must be received by January 21, 2003.

ADDRESSES: Send written comments to: Chief, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 50221, Washington, DC 20091-0221 (Attn: Notice No. 963). Copies of the petition, the proposed regulations, the appropriate maps, and any written comments received will be available for public inspection by appointment at the ATF Reference Library, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC 20226; telephone 202-927-7890. See the "Public Participation" section of this notice for alternative means of commenting.