

**Subpart H—Capital Adequacy**

2. Add new paragraph (f)(2)(ii)(L) to § 615.5210 to read as follows:

**§ 615.5210 Computation of the permanent capital ratio.**

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(L) Asset- or mortgage-backed securities (not issued or guaranteed by the United States Government, a Government agency, or a Government-sponsored agency).

\* \* \* \* \*

Dated: March 24, 2003.

**Jeanette C. Brinkley,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 03-7387 Filed 3-27-03; 8:45 am]

BILLING CODE 6705-01-P

**SMALL BUSINESS ADMINISTRATION****13 CFR Part 121**

RIN 3245-AE84

**Small Business Size Regulations; Petroleum Refiners**

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Small Business Administration (SBA) is modifying the small business size standard for petroleum refiners for purposes of Federal government procurement. The modification consists of the following: Increasing the capacity component of the standard from 75,000 barrels per day (bpd) to 125,000 barrels per calendar day (bpcd); defining capacity in bpcd; and measuring a refiner's total Operable Atmospheric Crude Oil Distillation Capacity. This is a better definition of what size a refiner must be to qualify as a small refiner for the Federal government's procurement of refined petroleum products. SBA is not changing the 1,500 employee size standard for this industry.

**DATES:** This rule is effective April 28, 2003.

**FOR FURTHER INFORMATION CONTACT:** Carl J. Jordan, Office of Size Standards, (202) 205-6618 or [sizestandards@sba.gov](mailto:sizestandards@sba.gov).

**SUPPLEMENTARY INFORMATION:**

*Introduction:* SBA is modifying the small business size standard for North American Industry Classification System (NAICS) 324110, Petroleum Refineries, for purposes of the Federal Government's procurement of refined petroleum products. The revised size

standard replaces current footnote 4 to SBA's Table of Small Business Size Standards, contained in 13 CFR 121.201. The footnote will now read as follows:

*NAICS code 324110*—For purposes of Government procurement, the petroleum refiner must be a concern that has no more than 1,500 employees nor more than 125,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity. Capacity includes owned or leased facilities as well as facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput. The total product to be delivered under the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

*Background:* On February 12, 2002, SBA proposed in the **Federal Register** (67 FR 6437): (1) To increase the capacity component of the standard from 75,000 bpd to 155,000 bpcd; (2) to clarify that the capacity component is measured in bpcd as defined by the U.S. Department of Energy, Energy Information Administration (EIA); and (3) to clarify that the capacity component is a measure of a refiner's total Operable Atmospheric Crude Oil Distillation Capacity, as used by EIA. The proposed rule included the history of this small business size standard, the reasons for the proposed changes, a description of how SBA establishes and evaluates small business size standards, and alternatives that SBA considered proposing.

*Summary of Comments:* SBA received 15 comments to the proposed rule, which are discussed below. They were received from the following organizations: one industry association, six small refiners, six-other-than small refiners, one Federal agency, and a United States Senator. The comments reflect no prevailing opinion about the level to which SBA should increase the capacity component, nor even whether or not SBA should increase it at all. Below SBA summarizes the four significant issues raised by the comments and provides SBA's consideration of those comments.

**1. Whether SBA Should Retain Refiners' Capacity as a Component of the Size Standard**

*Comments received:* All commenters but one stated that capacity is a valid and meaningful size measure for purposes of the Federal government's procurement of refined petroleum products. One commenter pointed out that other regulations, such as the Clean Air Act and the Emergency Petroleum Allocation Act, define small refiners and small refineries in terms of their

capacity. Another commenter supported that point by stating that it "is always helpful to the public for Federal agencies to clarify and standardize their definitions and measures." Another commenter stated that capacity is and has been the historical basis for small business determinations in the refinery industry, and believes that it is the best method for doing so.

*SBA's position:* SBA concurs with these commenters. Refining capacity is a relevant measure for the petroleum refining industry. Consistency with the historical size standard and with measurements used by other Federal agencies such as EIA and the Environmental Protection Agency (EPA) is important.

**2. Whether SBA Should Replace "Barrels Per Day" With "Barrels Per Calendar Day"**

*Comments received:* SBA received eight comments on this subject, four of which support and four of which do not support the change of term. Supporters favored the change as a useful standardization among Federal government agencies. Opponents believed it could allow for "gaming" and permit other than small refiners to qualify as small by reducing output, and that it relies too heavily on representations made to EPA.

*SBA's position:* SBA does not agree that the use of "barrels per calendar day" (bpcd) would necessarily lead to gaming. Bpcd measures a refiner's present capacity to produce, not its actual production. It is a static amount, that a refiner uses when it self-certifies that it is small to a Federal procuring agency, which is generally when it submits its initial offer including price (13 CFR 121.404). Since it could change, it may or may not be the same as what it stated in its annual certification to EIA. Nor is bpcd a measure of how much a refiner has produced, but rather how much a refiner "can process under usual operating conditions \* \* \*" allowing for a number of limitations, as stated in EIA's definition of "Barrels Per Calendar Day." This term is also consistent with the standard measure that EIA uses to rank U.S. refiners by size, and that other agencies, such as EPA, use when applicable to enforcement of their regulations.

Bpcd, which includes both the refiners' operating and idle capacity, is an estimate (as are bpd and barrels per stream day), taking into consideration anticipated downtime, etc. Further, EIA's definition of "Barrels Per Calendar Day" takes into consideration, " \* \* \* the environmental constraints associated with refinery operations"

(see EIA's definition of "Barrels per Calendar Day" in the glossary to Petroleum Supply Annual 2000, Vol. 1).

If a refiner believes that a successful bidder is not small when it self-certifies as such, then that refiner, or any other interested party, may file a size protest with the procuring agency's contracting officer. Provisions and procedures for doing so are set forth in SBA's Small Business Size Regulations, 13 CFR 121.1001–1010, "Procedures for Size Protests and Requests for Formal Size Determinations" and the Federal Acquisition Regulation (FAR) 48 CFR 19.302, "Protesting a small business representation."

SBA believes that standardizing measurement units among Federal agencies is an appropriate justification for this part of the rule, because it is consistent with the type of information refiners furnish EIA and that EIA reports. Additionally, the rule applies only to the Federal government's procurement of refined petroleum products.

### 3. Whether SBA should increase the capacity component to 155,000 bpcd

*Comments received:* Eight commenters opposed SBA's proposed increase to 155,000 bpcd. Three, including a national petroleum association, opposed the increase to 155,000 bpcd, and suggested 125,000 bpcd as an acceptable alternative because it would be sufficient to allow small refiners to increase their capacity without affecting their small refiner status. The association maintained that a 155,000 bpcd refiner is not a small business, and that it is well above the level for realizing economies of scale. In addition, noted the association, most small refiners, under the current definition, are not disadvantaged when competing in local and regional markets.

Four of the eight opposed any increase at all. The current size standard is adequate, one argued, to allow expansion, mergers or acquisition among existing small refiners. The commenter maintained that there are economic benefits that accrue to the small refiner that loses its eligibility as a small refiner by merger or acquisition. Accordingly, such growth provides the economies of scale that were not available to the small refiner and that will adequately compensate the small refiner for its loss of small refiner status.

Commenters also had concerns, if SBA were to adopt the proposed rule, with adding additional refiners to the existing universe of small refiners. Since newly eligible refiners would be substantially larger than currently small

refiners, the adoption of the proposed rule could adversely affect small refiners' ability to compete for Federal government contracts and undermine their competitiveness. Some stated that SBA's targeted 7.6 percent of domestic production capacity may not be correct in today's economy, and that a smaller share for small refiners may actually be more appropriate in today's competitive environment. Some commenters were particularly concerned with the possible effect on regional markets served by both small refiners and those refineries below 75,000 bpcd that are affiliated with others, and do not qualify as small refiners because of their total refiner capacity.

Another commenter expressed concern that the proposed rule might actually be detrimental to existing small refiners and result in less fuel supply in one or more states, particularly because of the inclusion of refiners that are significantly larger than the current small refiners. The commenter is concerned that newly classified small refiners would be located in geographic areas where there is now significant small refiner participation. The commenter also questioned SBA's targeted 7.6 percent share of domestic petroleum production.

Four commenters supported the increase to 155,000 bpcd as adequate to meet the purposes of the proposed rule, and stated that size standard should be no higher. A fifth, supporting an increase, commented that SBA should increase the size standard more, to about 160,000 bpcd. In the proposed rule, SBA projected that there would be no more than two refiners that would gain small refiner status if it adopted the proposed rule. The commenter stated that, at 155,000 bpcd, due to one refiner's increase in capacity that was not caused by merger, acquisition, *etc.*, there will be only one refiner with 1,500 employees or less that could qualify as a small refiner, not two. That is, there would remain only one U.S. refiner with 1,500 employees or less that would not qualify as a small refiner.

One of the five comments in support of an increase in the size standard noted that the reduced number of small refiners is due to closures because small refiners could not compete with larger, integrated refiners. Another stated that 155,000 bpd is consistent with the EPA's definition of a small refiner and that this size standard will restore small refiners' capacity to their historical levels. 155,000 bpd is below the average sized refiner, and allows for some limited expansion by small refiners.

One refiner agreed with SBA that a size standard of 75,000 bpd is too low.

The refiner suggested eliminating the capacity requirement, maintaining that it would be more far reaching than retaining a capacity limit.

Commenters suggested other alternatives as well. One would qualify a refiner as small if it has no more than 1,500 employees and/or no refinery larger than 100,000 bpd. Because EPA has granted certain compliance exemptions to refineries below 155,000 bpd and the exemptions can run until 2010, the commenter also suggested that SBA not increase the standard until the 2010 or when refineries have complied, whichever occurs first.

Another commenter was not entirely opposed to the increase, but offered an alternative—retain the 75,000 bpd capacity per refinery and increase the limit to 155,000 bpd for the entire company. The refiner also suggested including in the number of employees only those that are employed in the refining activity of the refiner. This refiner suggested eliminating the 1,500 employee size standard entirely, or counting only those that are engaged in refining operations. The commenter stated that the 1,500 employee size standard lacks meaning when measuring a refiner's resources available for competing for government contracts.

*SBA's position:* After evaluating all comments, SBA agrees that increasing the capacity component to 155,000 bpcd would not provide the best assistance for small refiners. SBA agrees with the position of the commenters that recommended a smaller increase of 125,000 bpcd. SBA accepts the position that refiners with 155,000 bpcd would be above the level needed to realizing economies of scale that accrue to refiners of that size and suffer no disadvantage when competing in local and regional markets. Further, because SBA recognizes that most if not all currently small refiners produce and market their products regionally, adding significantly larger refineries owned by newly designated small refiners to those regions could adversely affect small refiners' ability to bid for and fulfill Federal government contracts as small refiners. SBA accepts commenters' concerns that additional competition from substantially larger refiners in their competitive areas might adversely affect those refiners that are currently defined as small. From EIA's Form EIA-820, "Annual Refinery Report" as of January 1, 2002, SBA determined that increasing the standard to 125,000 bpcd will not characterize any refiners as small that are not small now. Therefore, increasing the size standard to 125,000 bpcd will not by itself increase the number of small refiners competing for Federal

government contracts. At that level, the small refiners' share of total U.S. petroleum refining will not be restored to the 7.6 percent share attained by the 1992 revision to the size standard. In its proposed rule, SBA did not intend to present the attainment of a particular small refiners' share as determinative of an appropriate size standard, but rather as only a reference to prior Agency actions. The data on the industry and the comments received on the proposed size standard taken as a whole serve as the basis for SBA's final decision to adopt 125,000 bpcd as the size standard. Although increasing the size standard to 125,000 bpcd does not create additional small refiners, it provided a significant increase in the size standard to allow current small refiners to realize economies of scale through an expansion of their operations or to merge with other small refiners.

SBA does not agree with the commenter that suggests more than one capacity limit. SBA believes this approach would be overly complex as well as a burdensome measure for Federal agencies to apply. Also, SBA does not agree that employees should either be eliminated from the standard or that only those employees in the refining industry be counted. NAICS classifies petroleum refining as a manufacturing industry, as did the Standard Industrial Classification system. Consistent with section 3(a)(2) of the Small Business Act, SBA has established size standards for all manufacturing concerns in terms of number of employees. Further, to include only those employees involved in refinery operations would conflict with SBA's Small Business Size Regulations, 13 CFR 121.106, "How does SBA calculate number of employees?" The regulation requires that all employees of the concern be used to measure the size of a concern, including those of its domestic and foreign affiliates, no matter how or where they are employed.

SBA does not "phase in" size standards. This is because SBA's size standards do not depend on whether or not a concern is small for another agency's program, or on when it comes into compliance with another agency's regulations. Some Federal agencies, such as EPA, outside of their Federal government procurement activities, use small business size standards mostly for regulatory enforcement. For instance, under EPA's gasoline sulfur regulations at 40 CFR part 80, a refiner is small if it had average crude capacity less than or equal to 155,000 bpcd for 1998. To delay applying a size standard for some companies until they have complied

with EPA's regulations, and not delay applying it to others, is inconsistent with SBA's rules and regulations. On a given Federal procurement, it does not treat all bidders equitably. A further reason why delaying application of the size standard until a refiner complies with environmental regulations is not a factor is that a refiner's bpcd capacity takes into effect, as noted above, "\* \* \* the environmental constraints associated with refinery operations" (see EIA's definition of "Barrels per Calendar Day").

Small business size standards have their greatest incidence of applicability in Federal procurement. This 125,000 bpcd size standard relates only to the Federal government's procurement of refined petroleum products, and refiners' participation in the program is voluntary. Size standards for Federal procurement and for all Federal programs apply to every concern in its industry, regardless of the status of their compliance with rules and regulations that have different purposes.

#### **4. Whether SBA Should Incorporate "Total Operable Atmospheric Crude Oil Distillation Capacity" into Its Small Business Definition**

*Comments received:* Two commenters, an association and a refiner, support the added language to standardize the measure within the Federal government. Two other commenters, one a small refiner and the other not, did not see the need for the added clarification. None of the commenters, however, expressed a strong preference of one over the other.

*SBA's position:* SBA believes that adding "total Operable Atmospheric Crude Oil Distillation Capacity" does in fact add to the specificity of the definition by distinguishing it from refiners' "Downstream Charge Capacity." SBA's definition of a small refiner should, where practical, use terms consistent with those of EIA to avoid confusion among users of the definition. The phrase "total Operable Atmospheric Crude Oil Distillation Capacity" therefore clarifies and specifies the subject of measurement when determining a refiner's small refiner status, because it does not include "Downstream Charge Capacity."

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

The Office of Management and Budget (OMB) has determined that this rule is a "significant" regulatory action for purposes of Executive Order 12866. Size

standards determine which businesses are eligible for Federal small business programs. This is not a major rule under the Congressional Review Act, 5 U.S.C. 800. For the purpose of the Paperwork Reduction Act, 44 U.S.C. ch. 35, SBA has determined that this rule would not impose new reporting or record keeping requirements, other than those required of SBA. For purposes of Executive Order 13132, SBA has determined that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment. For purposes of Executive Order 12988, SBA has determined that this rule is drafted, to the extent practicable, in accordance with the standards set forth in that order. Our Regulatory Impact Analysis follows.

#### **Regulatory Impact Analysis**

##### *1. Is There a Need for This Regulatory Action?*

SBA is chartered to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To effectively assist intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to the SBA Administrator the responsibility for establishing small business definitions. The Act also requires that small business definitions vary to reflect industry differences. The supplementary information to the proposed rule explained the approach SBA follows when analyzing a size standard for a particular industry. Based on that analysis and on the comments SBA received to the proposed rule, SBA believes an increase is supportable, but to a 125,000 bpcd instead of the proposed 155,000 bpcd.

##### *2. What Are the Potential Benefits and Costs of This Regulatory Action?*

The rule affects Federal government agencies purchasing refined petroleum products and small refiners that compete to sell refined petroleum products to the Federal government. Increasing the 75,000 bpcd size standard to 125,000 bpcd will enable small refiners to expand their refining operations or to merge with other small refiners. They can compete for larger Federal petroleum procurements set aside for small businesses or for the 8(a) and HUBZone Empowerment Contracting Programs, as well as those awarded through full and open competition after application of the HUBZone or small disadvantaged

business price evaluation preference or adjustment. Federal agencies will benefit from the higher size standards if more small refiners compete for more set-aside petroleum procurements. This will increase competition and lower the prices on set-aside petroleum procurements. The higher size standard will also likely influence Federal agencies to set aside more petroleum procurements. Price increases associated with set-aside procurements will be minimal because set-asides must be awarded at fair and reasonable prices. The increased size standard will allow, and possibly encourage, small refiners to increase their operational efficiencies without jeopardizing their small business status. Currently small refiners will become more competitive and this could result in lower prices to the Federal government and to private sector customers.

The higher size standard may have distributional effects between large and small refiners. The actual outcome of the gains and losses between small and large refiners cannot be estimated with certainty. Small refiners may obtain petroleum contracts from what would have been awarded to refiners that are not small. Large refiners might lose some Federal petroleum contracts to small refiners if Federal agencies decide to set aside more petroleum procurements for small refiners. The potential loss of contracts to large businesses would be limited to the amount of petroleum that expanding small refiners were willing and able to sell to the Federal government. Small nonmanufacturers can also obtain additional petroleum contracts as a result of a higher petroleum size standard. On set-aside petroleum procurements, a small nonmanufacturer must supply the product of a small petroleum refiner. With an effectively larger base of small refiners, nonmanufacturers would have access to a larger supply of petroleum products from small refiners. The potential gain in contracting opportunities for small nonmanufacturers would be limited to the amount of petroleum the expanded small refiners are willing and able to supply through a third party as opposed to selling directly to the Federal government.

The revision to the current size standard for petroleum refineries is consistent with SBA's statutory mandate to assist small business. This regulatory action promotes the Administrator's objectives. One of SBA's goals in support of the Administrator's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit,

government contracts, and management and technical assistance. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them. Size standards do not interfere with State, local, and tribal governments in the exercise of their government functions. In a few cases, State and local governments have voluntarily adopted SBA's size standards for their programs to eliminate the need to establish an administrative mechanism to develop their own size standards.

For purposes of the Regulatory Flexibility Act (RFA), SBA has determined that this rule does not have a significant economic effect on a substantial number of small entities. As stated in the **SUPPLEMENTARY INFORMATION** section, SBA estimates that this rule will create no additional small refiners. Accordingly, SBA does not believe there will be significantly increased competition that could harm small refiners. On the contrary, small refiners will be able to bid on and perform more and larger Federal procurements using some of the same business practices as the largest refiners (though on a smaller scale), proportionate to their sizes. In addition, since Federal procurement programs are voluntary, this rule will not impose any significant costs on any small refiners participating in the Federal procurement of petroleum programs. Further, the rule will not affect the amount of refined petroleum purchased by the Federal government. Federal government procurement dollars are expected to remain about the same. In addition, since more small refiners will be able to share resources, they will be eligible for more Federal procurement dollars.

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

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

■ For the reasons stated in the preamble, SBA amends part 121 of title 13 of the Code of Federal Regulations as follows:

#### PART 121—SMALL BUSINESS SIZE REGULATIONS

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

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

■ 2. In § 121.201, revise footnote 4 at the end of the table titled "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?

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#### FOOTNOTES

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■ 4. *NAICS code 324110*—For purposes of Government procurement, the petroleum refiner must be a concern that has no more than 1,500 employees nor more than 125,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity. Capacity includes owned or leased facilities as well as facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput. The total product to be delivered under the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

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Dated: February 5, 2003.

**Hector V. Barreto,**  
*Administrator.*

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BILLING CODE 8025-01-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 100

[CGD05-03-030]

RIN 1625-AA08

#### Special Local Regulations for Marine Events; Severn River, College Creek, and Weems Creek, Annapolis, MD

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of implementation of regulation.

**SUMMARY:** The Coast Guard is implementing the special local regulations at 33 CFR 100.518 for the U.S. Naval Academy Crew Races, marine events to be held April 26, 2003 and May 25, 2003, on the waters of the Severn River at Annapolis, Maryland. These special local regulations are necessary to control vessel traffic due to the confined nature of the waterway and expected vessel congestion during the events. The effect will be to restrict general navigation in the regulated area for the safety of spectators and vessels transiting the event area.

**EFFECTIVE DATES:** 33 CFR 100.518 is effective from 5:30 a.m. to 9:45 a.m. on