

agreement is not being renewed or a WBC is terminated, regardless of cause, the recipient organization will address the following in its closeout process and perform the necessary inventories and reconciliations prior to submitting the final annual financial report.

(i) An inventory of WBC property must be compiled, evaluated, and all property and the aggregate of usable supplies and materials accounted for in this inventory.

(ii) Program income balances will be reconciled and unused WBC program income which is not used as match or cannot otherwise be used to offset legitimate expenditures of the WBC must be returned to the SBA.

(iii) Client records, paper and electronic, will be compiled to facilitate an SBA program closeout review.

(iv) Financial records will be compiled to facilitate a closeout of the SBA financial examination.

(2) *SBA*. Upon receipt of the final annual financial report from a non-renewing or terminated recipient organization, the AA/OWBO will issue disposition instructions to the former recipient organization.

(c) *Final disposition*. (1) The final financial status report from the recipient organization must include the information identified in the inventory process and identify any WBC program income collected for services provided.

(2) The AA/OWBO will issue written disposition instructions to the recipient organization providing the following:

(i) The name and address of the entity or agency to which property and program income must be transferred;

(ii) The date by which the transfer must be completed;

(iii) Actions to be taken regarding property and WBC program income;

(iv) Actions to be taken regarding WBC program records such as client and training files; and

(v) Authorization to incur costs for accomplishing the transfer. Such costs may, when authorized, be applied to residual WBC program income or Federal or matching funds.

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

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Subpart L issued under 15 U.S.C. 636(a)(36); Pub. L. 116-136, 134 Stat. 281; Pub. L. 116-139, 134 Stat. 620; Pub. L. 116-142, 134 Stat. 641; and Pub. L. 116-147, 134 Stat. 660.

Subpart M issued under 15 U.S.C. 657a; Pub. L. 117-81, 135 Stat. 1541.

SOURCE: 61 FR 2683, Jan. 29, 1996, unless otherwise noted.

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EDITORIAL NOTE: Nomenclature changes to part 134 appear at 72 FR 50042, Aug. 30, 2007.

Subpart A—General Rules

§ 134.101 Definitions.

As used in this part:

AA/OHA means the Assistant Administrator for OHA, who is also the Chief Hearing Officer.

Act means the Small Business Act, 15 U.S.C. 631 *et seq.*

Address means the primary home or business address of a person or entity, including the street location or postal box number, city or town, state, and postal zip code.

Administrative Judge means a Hearing Officer, as described at 15 U.S.C. 634(i), appointed by OHA to adjudicate cases.

Appeal petition has the same meaning as petition.

Area Office means a Government Contracting Area Office or a Disaster Area Office of the Small Business Administration.

Business day means any day other than a Saturday, Sunday, or a Federal holiday.

Day means a calendar day, unless a Judge specifies otherwise.

Hearing means the presentation and consideration of argument and evidence. A hearing need not include live testimony or argument.

Investment Act means the Small Business Investment Act of 1958, 15 U.S.C. 661 *et seq.*

Judge means the Administrative Judge or Administrative Law Judge who decides an appeal or petition brought before OHA, or the AA/OHA when he or she acts as an Administrative Judge.

NAICS code means North American Industry Classification System code.

OHA means the Office of Hearings and Appeals.

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

Person means an individual or any form of business entity.

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

Petitioner means the person who initially files a petition before OHA.

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

Respondent means any person or governmental agency against which a case has been brought before OHA.

SBA means the Small Business Administration.

Size determination means a formal size determination made by an Area Office and includes 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.

Size Standard Petition means a petition for reconsideration of a revised, modified, or established size standard filed with OHA pursuant to 15 U.S.C. 632(a)(9) and subpart I of this part.

Step One and *Step Two* refer to the steps of the Employee Dispute Resolution Process, see §134.801(a) for more information.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47246, July 18, 2002; 69 FR 29208, May 21, 2004; 75 FR 47438, Aug. 6, 2010; 82 FR 25506, June 2, 2017]

§ 134.102 Jurisdiction of OHA.

OHA has authority to conduct proceedings in the following cases:

(a) The revocation or suspension of Small Business Investment Company licenses, cease and desist orders, and the removal or suspension of directors and officers of licensees, under the Investment Act and part 107 of this chapter;

(b) Alleged violations of those civil rights laws which are effectuated by parts 112, 113, 117, and 136 of this chapter;

(c) The revocation of the privilege of a person to conduct business with SBA under the Act and part 103 of this chapter;

(d) 7(a) Lender appeals from informal enforcement actions and final agency decisions on 7(a) Lender formal enforcement actions, and any other appeal that is specifically authorized by

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part 120 of this title, but not including appeals of actions against SBA Supervised Lenders under §120.1600(b) or (c) or under §120.465;

(e) The suspension or termination of surety bond program participants under 15 U.S.C. 694a *et seq.* and part 115 of this chapter;

(f) [Reserved]

(g) Allowance of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. 504;

(h) Debarment from appearance before the SBA because of post-employment restrictions under 18 U.S.C. 207 and part 105 of this chapter;

(i) Collection of debts owed to SBA and the United States under the Debt Collection Act of 1982, the Debt Collection Improvement Act of 1996, and part 140 of this chapter;

(j) Appeals from the following SBA 8(a) program determinations under the Act and part 124 of this chapter:

(1) Denial of program admission based solely on a negative finding as to social disadvantage, economic disadvantage, ownership or control; program termination; program graduation; or denial of a waiver of the requirement to perform to completion an 8(a) contract; and

(2) Program suspension;

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

(l) The imposition of civil penalties and assessments against persons who make false claims or statements to SBA under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812 and part 142 of this chapter;

(m)–(n) [Reserved]

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

(p) Certain matters involving debarments and suspensions under 2 CFR parts 180 and 2700;

(q) [Reserved]

(r) Appeals from SBA Employee Dispute Resolution Process cases (Employee Disputes) under Standard Operating Procedure (SOP) 37 71 (available at <http://www.sba.gov/tools/resourcelibrary/sops/index.html> or

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through OHA's Web site <http://www.sba.gov/oha>) and subpart H of this part;

(s) Appeals from Women-Owned Small Business or Economically-Disadvantaged Women-Owned Small Business protest determinations under part 127 of this chapter;

(t) Petitions for reconsideration of revised, modified, or established size standards pursuant to 15 U.S.C. 632(a)(9);

(u) Protests of eligibility for inclusion in the Veteran Small Business Certification Program;

(v) Appeals of denials of certification in and decertification from the Veteran Small Business Certification Program;

(w) Appeals of certain SBA loan review decisions as defined in 13 CFR 134.1201; and

(x) Appeals from HUBZone status protest determinations under part 126 of this chapter.

[61 FR 2683, Jan. 29, 1996, as amended at 66 FR 47074, Sept. 11, 2001; 67 FR 47246, July 18, 2002; 69 FR 25271, May 5, 2004; 69 FR 29208, May 21, 2004; 70 FR 17587, Apr. 7, 2005; 72 FR 39730, July 20, 2007; 73 FR 56954, Oct. 1, 2008; 75 FR 47438, Aug. 6, 2010; 75 FR 62292, Oct. 7, 2010; 82 FR 25506, June 2, 2017; 83 FR 13628, Mar. 30, 2018; 85 FR 14784, Mar. 16, 2020; 85 FR 52887, Aug. 27, 2020; 87 FR 73425, Nov. 29, 2022; 88 FR 21089, Apr. 10, 2023]

§ 134.103 [Reserved]

Subpart B—Rules of Practice

§ 134.201 Scope of the rules in this subpart.

(a) The rules of practice in this subpart apply to all OHA proceedings except:

(1) Where another subpart of this part, pertaining to a specific type of OHA proceeding, provides a different rule; or

(2) Where another part of this chapter, pertaining to a specific type of OHA proceeding (or SBA program allowing appeals to OHA), provides a different rule (see § 134.102).

(b) For specific types of OHA proceedings, the rules of practice are located as follows:

(1) For appeals from size determinations and NAICS code designations, in subpart C of this part (§ 134.301 *et seq.*);

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- (2) For 8(a) BD appeals, in subpart D of this part (§ 134.401 *et seq.*);
- (3) [Reserved]
- (4) For applications under the Equal Access to Justice Act, in subpart F of this part (§ 134.601 *et seq.*);
- (5) For appeals from Women-Owned Small Business (WOSB) and Economically-Disadvantaged WOSB protest determinations, in subpart G of this part (§ 134.701 *et seq.*);
- (6) For appeals relating to SBA employee disputes, in subpart H of this part (§ 134.801 *et seq.*);
- (7) For Size Standard Petitions, in subpart I of this part (§§ 134.901 through 134.918);
- (8) For protests of eligibility for inclusion in the Veteran Small Business Certification Program, in subpart J of this part;
- (9) For appeals of denials of certification and decertification in the Veteran Small Business Certification Program, in subpart K of this part;
- (10) For appeals of protest determinations regarding the status of a concern as a certified HUBZone small business concern, in subpart M of this part; and
- (11) For proceedings under the Program Fraud Civil Remedies Act, in part 142 of this chapter.

(c) If a rule in this subpart conflicts with a rule pertaining to OHA in another subpart of this part or in another part of this chapter, the latter rule shall govern.

[75 FR 47438, Aug. 6, 2010, as amended at 82 FR 25506, June 2, 2017; 83 FR 13629, Mar. 30, 2018; 87 FR 73425, Nov. 29, 2022; 88 FR 21089, Apr. 10, 2023]

§ 134.202 Commencement of cases.

(a) A party other than the SBA may commence a case by filing an appeal petition.

(1) The filing deadline is contained in the SBA regulations governing the specific type of appeal.

(2) Where the SBA action or determination being appealed states a different time period (or deadline) for filing an appeal petition than does the applicable regulation, the longer time period (or later deadline) governs.

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

filings the order to show cause with OHA.

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

(d) *Calculation and modification of time periods and deadlines.* (1) *Calculation of a deadline when the time period is given in days.* (i) Do not count the day the time period begins, but do count the last day of the time period.

(ii) If the last day is Saturday, Sunday, or a Federal holiday, the time period ends on the next business day.

Example: On Monday, a Judge orders a party to file and serve a document within (or no later than) five days. The time period begins on Monday, so the first day to count is Tuesday. The second, third, and fourth days are Wednesday, Thursday, and Friday. The fifth day is Saturday, so the time period rolls over to the next business day, which is Monday. The deadline is Monday (or Tuesday if Monday is a Federal holiday).

(2) *Modification of a time period or deadline.* (i) A Judge may modify any time period or deadline, except:

(A) The time period governing commencement of a case (*i.e.*, when the appeal petition may be filed); and

(B) A time period established by statute.

(ii) A party may move for an extension of time pursuant to § 134.211.

[67 FR 47246, July 18, 2002, as amended at 70 FR 17587, Apr. 7, 2005; 75 FR 47439, Aug. 6, 2010]

§ 134.203 The appeal petition.

(a) A petition must contain the following:

(1) The basis of OHA's jurisdiction (see § 134.102);

(2) A copy of the SBA determination being appealed, if applicable, and the date the determination was received by the petitioner;

(3) A clear and concise statement of the factual basis of the case and applicable legal arguments;

(4) The relief being sought;

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(5) The name, address, telephone number, facsimile number, e-mail address, and signature of the petitioner or its attorney; and

(6) A certificate of service (see § 134.204(d)).

(b) If the applicable subpart of this part 134 (or the program regulations) requires other documents or information with the appeal petition, these must also be included.

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

(d) *Format.* (1) An appeal petition should be on 8.5" x 11" paper with a clear type at least 12 point in size. Preferably, double-space the main text and use 1" margins all around. Number each page. A separate cover letter is not needed. A table of contents is optional. Hard copies of documents sent by facsimile or electronic mail are not needed unless specifically requested.

(2) The maximum length of an appeal petition (not including attachments) is 20 pages, unless prior leave is sought by the petitioner and granted by the Judge. A table of authorities is required only for petitions citing more than twenty cases, regulations, or statutes.

(3) Clearly label any exhibits and attachments. Do not include documents already submitted to SBA in connection with the matter being appealed. SBA will submit these directly to OHA.

(e) *Motion for a more definite appeal petition.* A respondent, SBA, or a contracting officer (for NAICS appeals) may, not later than five days after receiving a petition, move for an order to the petitioner to provide a more definite appeal petition or otherwise comply with this section. A Judge may order a more definite appeal petition on his or her own initiative.

(1) A motion for a more definite appeal petition stays the respondent's time for filing an answer or response. The Judge will establish the time for filing and serving an answer or response.

(2) If the petitioner does not comply with the Judge's order to provide a more definite appeal petition or other-

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wise fails to comply with applicable regulations, the Judge may dismiss the petition with prejudice.

(f) *Notice and Order.* After an appeal petition is filed, OHA will issue a Notice and Order and serve it upon all known parties (or their attorneys). If a party does not receive a Notice and Order, it should contact OHA.

[67 FR 47247, July 18, 2002, as amended at 75 FR 47439, Aug. 6, 2010]

§ 134.204 Filing and service requirements.

All pleadings or other submissions must be filed with OHA and served on all other parties or their attorneys. Each submission requires a certificate of service.

(a) *Methods of filing and service.* E-mail, mail, delivery, and facsimile are all permitted unless a Judge orders otherwise.

(1) E-mail constitutes any system for sending and receiving messages electronically over a telecommunications network. The sender is responsible for ensuring that e-mail software and file formats are compatible with the recipient and for a successful, virus-free transmission.

(2) Mail includes any service provided by the U.S. Postal Service. Mail (except "Express Mail") is not recommended for time-sensitive filings.

(3) Delivery is personal delivery by a party, its employee, its attorney, or a commercial delivery service.

(4) Facsimile submissions should not exceed 30 pages. Contact OHA before faxing longer submissions. Follow-up originals or "hard copies" are not required unless OHA or another party specifically requests them.

(b) *Filing.* Filing is the receipt of pleadings and other submissions at OHA. Filers may call OHA to verify receipt. OHA's telephone number is (202) 401-8200.

(1) *OHA's address.* OHA accepts filings: by e-mail at OHAFilings@sba.gov; by mail or delivery at Office of Hearings and Appeals, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; and by facsimile at (202) 205-7059.

(2) The date of filing is the date the submission is received at OHA. Any submission received at OHA after 5

p.m. eastern time is considered filed the next business day.

(3) *Exhibits.* An exhibit, whether an original or a copy, must be authenticated or identified to be what it purports to be. Parties are referred to 28 U.S.C. 1746.

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

(i) a genuine question is raised as to whether it is a true and accurate copy, or

(ii) it would be unfair, under the circumstances, to admit the copy instead of the original.

(c) *Service.* Service means sending a copy of a pleading or other submission filed with OHA to another party.

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

(2) The date of service is as follows: for e-mail and facsimile, the date the copy is sent; for personal delivery, the date the copy is given to the party, its attorney, or the commercial delivery service (if one is used). For mail, date of service is postmark date; in absence of a legible postmark, there is a rebuttable presumption that the copy was mailed five days before the served party's receipt.

(3) *SBA address.* The correct office(s) of SBA must be served, as required by the applicable program regulations, by other subparts of part 134, or by the instructions on the SBA determination being appealed. If the SBA office for service is not specified elsewhere, serve: Office of General Counsel, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

(4) *Confidential information.* If a pleading or other submission contains proprietary or confidential information, that information may be redacted (deleted) from any copies served upon non-government parties. Counsel for those parties may access the redacted information only under the protective order procedure described in § 134.205.

(d) *Certificate of service.* A certificate of service shows how, when, and to

whom service was made. Each submission to OHA must include a certificate of service. The certificate should state: "I certify that on [date], I served the foregoing [type of submission] by [e-mail, mail, Express Mail, personal delivery, commercial delivery service, facsimile] upon the following". List the name and address of each party served, and either the facsimile number or the e-mail address (if applicable). The individual serving the submission must sign the certificate and either print or type his or her name and title.

[75 FR 47439, Aug. 6, 2010]

§ 134.205 The appeal file, confidential information, and protective orders.

(a) *The appeal file.* The appeal file includes: all pleadings and other submissions; all admitted evidence; any recordings and transcripts of proceedings; the solicitation and amendments; in the case of an appeal of an SBA determination, the entire record on which that determination was based (*i.e.*, the administrative record, protest file, area office file); and any orders and decisions that have been issued.

(b) *Confidential business and financial information.* An appeal file usually contains confidential business and financial information pertaining to the party whose eligibility (as a small business, SDVO SBC, etc.) is at issue. A party may redact its own confidential business and financial information from the copies of its submissions it must serve on other non-government parties (usually protesters). A party served with redacted submissions must file and serve any objections to the redactions within two business days of its receipt of the submissions. The Judge then will rule on the objections and, if necessary, order the service of revised submissions.

(c) *Public access.* Except for confidential business and financial information; source selection sensitive information; income tax returns; documents and information covered under § 120.1060 of this title; and other exempt information, the appeal file is available to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552.

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(d) *Party access.* A party in a pending appeal may examine and copy the party's own submissions as well as any information in the appeal file that is not exempt from disclosure under the FOIA. Party access to the appeal file in a pending appeal does not require a FOIA request or a protective order.

(e) *Counsel's access under a protective order.* On request, OHA will issue a protective order under which outside counsel for a non-government party in a pending appeal may be admitted, to examine and copy the appeal file (except for tax returns and privileged information). The protective order will set out the terms to which counsel must agree. The terms will restrict counsel's use of the protected information to the pending appeal and will prohibit any further disclosure. Violations of the terms of a protective order may result in sanctions to the party and referral of the attorney to bar disciplinary authorities. OHA's Web site contains detailed information on the protective order procedure.

(f) *Decisions.* OHA decisions are normally published without redactions on OHA's Web site. A decision may contain confidential business and financial information where that information is either decisionally-significant or otherwise necessary for a comprehensible decision. Where no protective order is in place, a party may request a redacted public decision by contacting OHA. Where a protective order is in place, the Judge will usually issue the unredacted decision under the protective order and then a redacted version for public release.

[75 FR 47440, Aug. 6, 2010, as amended at 85 FR 14784, Mar. 16, 2020]

§ 134.206 The answer or response.

(a)(1) Except in a case involving a petition appealing from an SBA determination, a respondent must file and serve an answer within 45 days after the filing of a petition or the service of an order to show cause, except that in debt collection cases, answers are due within 30 days.

(2) The answer must contain the following:

(i) An admission or denial of each of the factual allegations contained in the petition or order to show cause, or a

statement that the respondent denies knowledge or information sufficient to determine the truth of a particular allegation;

(ii) Any affirmative defenses; and
(iii) The name, address, telephone number, facsimile number, and signature of the respondent or its attorney.

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

(b) *Appeal of an SBA determination.* (1) *Notice and order.* Upon the filing of an appeal petition, OHA will issue a notice and order informing all known parties of the appeal petition and the deadline for filing and serving any responses to the appeal. The SBA response is due 45 days after the date the appeal petition is filed, unless a rule governing the particular type of appeal provides a different deadline.

(2) *SBA response.* If SBA is the respondent, SBA need not admit or deny the allegations in the petition, but must set forth the relevant facts and the legal arguments in support of SBA's determination.

(3) *Administrative record.* If SBA is to file and serve an authenticated copy of the administrative record (or protest file), the notice and order will provide further instructions.

(4) *Claim of privilege.* If SBA asserts a claim of privilege over any portion of the administrative record, SBA must serve the petitioner a redacted version, accompanied by a "Vaughn Index" describing each withheld item and justifying each claim of privilege. SBA also must file an unredacted copy for *in camera* inspection by the Judge. The Judge will afford the petitioner an opportunity to object to the administrative record and to challenge any claim of privilege asserted by SBA.

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

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time and directing respondent to file and serve a response within 45 days after petitioner timely serves respondent in accordance with the order.

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

(e) *Reply.* A reply to a response is not permitted unless the Judge, upon motion or on his or her own initiative, orders a reply to be filed and served. A party moving for leave to reply should file and serve the proposed reply with its motion.

[67 FR 47247, July 18, 2002, as amended at 75 FR 47440, Aug. 6, 2010]

§ 134.207 Amendments and supplemental pleadings.

(a) *Amendments.* Upon motion (see § 134.211), and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of amendments to pleadings. However, an amendment will not be permitted if it would cause unreasonable delay in the determination of the matter. The proposed amendment must be filed and served with the motion. The Judge, on his or her own initiative, may order a party to file and serve an amendment to a pleading.

(b) *Supplemental pleadings.* Upon motion (see § 134.211), and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of a supplemental pleading setting forth relevant transactions or occurrences that have taken place since the filing of the original pleading. The proposed supplemental pleading must be filed and served with the motion. The Judge, on his or her own initiative, may order a party to file and serve a supplemental pleading.

(c) *8(a) appeals.* In 8(a) program appeals, amendments to pleadings and supplemental pleadings will be per-

mitted by the Judge only upon a showing of good cause.

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

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47248, July 18, 2002; 75 FR 47441, Aug. 6, 2010]

§ 134.208 Representation in cases before OHA.

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

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

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

[67 FR 47248, July 18, 2002]

§ 134.209 Requirement of signature.

Every written submission to OHA, other than evidence, must be signed by the party filing that submission, or by the party's attorney. By signing the submission, a party or its attorney attests that the statements and allegations in that submission are true to the best of its knowledge, and that the submission is not being filed for the purpose of delay or harassment. False statements are subject to criminal penalties. Any misconduct is subject to sanctions (see § 134.219).

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47441, Aug. 6, 2010]

§ 134.210 Intervention.

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

(b) *By interested persons.* Any interested person may move to intervene at any time until the close of record by

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filling and serving a motion to intervene containing a statement of the moving party's interest in the case and the necessity for intervention to protect such interest. An interested person is any individual, business entity, or governmental agency that has a direct stake in the outcome of the appeal. The Judge may grant leave to intervene upon such terms as he or she deems appropriate.

[67 FR 47248, July 18, 2002]

§ 134.211 Motions.

(a) *Contents.* All motions must state the relief being requested, as well as the grounds and any authority for that relief. A motion must be filed, served, and accompanied by a certificate of service (see § 134.204).

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

(c) *Response.* All non-moving parties must file and serve a response to the motion or be deemed to have consented to the relief sought. The response is due no later than 15 days after the motion is served, unless the Judge sets a different deadline. On motion, or on his or her own initiative, the Judge may permit a reply to a response and/or oral argument on the motion.

(d) *Service of orders.* OHA will serve upon all parties any written order issued in response to a motion.

(e) *Motion to dismiss.* A respondent may file a motion to dismiss any time before a decision is issued. If an answer or response to the appeal petition has not yet been filed, the motion to dismiss stays the respondent's time to answer or respond.

(f) *Motion for an extension of time.* Except for good cause shown, a motion for an extension of time must be filed at

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least two business days before the original deadline.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998; 67 FR 47248, July 18, 2002; 75 FR 47441, Aug. 6, 2010]

§ 134.212 Summary judgment.

(a) *On motion by a party.* At any time before the close of record, a party may move for summary judgment as to all or any portion of the case, on the grounds that there is no genuine issue as to any material fact, and that the moving party is entitled to a decision in its favor as a matter of law.

(1) *Contents of motion.* The motion must include a statement of the material facts believed to be undisputed and the party's legal arguments. The motion may include supporting statements in accordance with 28 U.S.C. 1746. The motion must be filed, served, and accompanied by a certificate of service (see § 134.204).

(2) *Response.* No later than 15 days after the service of a motion for summary judgment, all non-moving parties must file and serve a response to the motion or be deemed to have consented to the motion for summary judgment.

(3) *Cross-motions.* In its response to a motion for summary judgment, a party may cross-move for summary judgment. The initial moving party must file and serve a response to any cross-motion for summary judgment within 15 days after the service of that cross-motion or be deemed to have consented to the cross-motion for summary judgment.

(4) *Stay.* If an answer or response to the appeal petition has not yet been filed, the motion for summary judgment stays the respondent's time to answer or respond. If the Judge denies the motion and an answer or response has not yet been filed, the respondent must file the answer or response within 15 days after the order deciding the motion unless otherwise ordered by the Judge.

(b) *On the Judge's own initiative.* The Judge may issue an order granting summary judgment as to all or any portion of the case in absence of a motion if there is no genuine issue to any material fact, and a party is entitled to a decision in its favor as a matter of law.

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(c) *Appeal of an SBA determination.* If the SBA determination being appealed was based on multiple grounds, SBA may move for summary judgment on one or more of those grounds. If the Judge finds, as to any ground, that there is no genuine issue of material fact and that the SBA is entitled to a decision in its favor as a matter of law, the Judge will grant the motion for summary judgment and dismiss the rest of the appeal.

[75 FR 47441, Aug. 6, 2010]

§ 134.213 Discovery.

(a) *Motion.* A party may obtain discovery only upon motion, and for good cause shown.

(b) *Forms.* The forms of discovery which a Judge can order under paragraph (a) of this section include requests for admissions, requests for production of documents, interrogatories, and depositions.

(c) *Limitations.* Discovery may be limited in accordance with the terms of a protective order (see § 134.205). Further, privileged information and irrelevant issues or facts will not be subject to discovery.

(d) *Disputes.* If a dispute should arise between the parties over a particular discovery request, the party seeking discovery may file and serve a motion to compel discovery. Discovery may be opposed on the grounds of harassment, needless embarrassment, irrelevance, undue burden or expense, privilege, or confidentiality.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998; 67 FR 47249, July 18, 2002; 75 FR 47441, Aug. 6, 2010]

§ 134.214 Subpoenas.

(a) *Availability.* At the request of a party, or upon his or her own initiative, a Judge may issue a subpoena requiring a witness to appear and testify, or to produce particular documents, at a specified time and place.

(b) *Requests.* A request for the issuance of a subpoena must be written, served upon all parties, and filed. The request must clearly identify the witness and any documents to be subpoenaed, and must set forth the relevance of the testimony or documents sought.

(c) *Service.* A subpoena may only be served by personal delivery. The individual making service shall prepare an affidavit stating the date, time, and place of the service. The party which obtained the subpoena must serve upon all other parties, and file with OHA, a copy of the subpoena and affidavit of service within 2 days after service is made.

(d) *Motion to quash.* A motion to limit or quash a subpoena must be filed and served within 10 days after service of the subpoena, or by the return date of the subpoena, whichever date comes first. Any response to the motion must be filed and served within 10 days after service of the motion, unless a shorter time is specified by the Judge. No oral argument will be heard on the motion unless the Judge directs otherwise.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002; 75 FR 47441, Aug. 6, 2010]

§ 134.215 Interlocutory appeals.

(a) *General.* A motion for leave to take an interlocutory appeal from a Judge's ruling will not be entertained in those proceedings in which OHA issues final decisions. In all other cases, an interlocutory appeal will be permitted only if, upon motion by a party, or upon the Judge's own initiative, the Judge certifies that his or her ruling raises a question which is immediately appealable. Interlocutory appeals will be decided by the AA/OHA or a designee.

(b) *Motion for certification.* A party must file and serve a motion for certification no later than 20 days after issuance of the ruling to which the motion applies. A denial of the motion does not preclude objections to the ruling in any subsequent request for review of an initial decision.

(c) *Basis for certification.* The Judge will certify a ruling for interlocutory appeal only if he or she determines that:

(1) The ruling involves an important question of law or policy about which there is substantial ground for a difference of opinion; and

(2) An interlocutory appeal will materially expedite resolution of the case, or denial of an interlocutory appeal would cause undue hardship to a party.

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(d) *Stay of proceedings.* A stay while an interlocutory appeal is pending will be at the discretion of the Judge.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002]

§ 134.216 Alternative dispute resolution procedures.

(a) At any time during the pendency of a case, the parties may submit a joint motion requesting that the Judge permit the use of alternative dispute resolution procedures to assist in resolving the matter. If the motion is granted, the Judge will also stay the proceedings before OHA, in whole or in part, as he or she deems appropriate, pending the outcome of the alternative dispute resolution procedures.

(b) A Judge may offer alternative dispute resolution procedures to the parties at any time during the proceeding.

(c) The AA/OHA or a Judge may designate a Judge or attorney assigned to OHA to serve as a neutral in alternative dispute resolution procedures. If OHA provides the neutral and the mediation fails to resolve all issues in the case, the OHA-provided neutral will not be involved in the adjudication.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47441, Aug. 6, 2010]

§ 134.217 Settlement.

At any time during the pendency of a case, the parties may submit a joint motion to dismiss the appeal if they have settled the case, and may file with such motion a copy of the settlement agreement. If the Judge has express authority, under statute, SBA regulation or SBA standard operating procedures, to review the contents of a settlement agreement for legality, the Judge may order the parties to file a copy of the settlement agreement. Otherwise, upon the filing of a joint motion to dismiss, the Judge will issue an order dismissing the case. Settlement negotiations, and rejected settlement agreements, are not admissible into evidence.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002]

§ 134.218 Judges.

(a) *Assignment.* The AA/OHA will assign all cases subject to the Adminis-

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trative Procedure Act, 5 U.S.C. 551 *et seq.*, to an Administrative Law Judge. The AA/OHA will assign all other cases before OHA to either an Administrative Law Judge or an Administrative Judge, or, if the AA/OHA is a duly licensed attorney, to himself or herself.

(b) *Authority.* Except as otherwise limited by this part, or by statute or other regulation, a Judge has the authority to take all appropriate action to ensure the efficient, prompt, and fair determination of a case, including, but not limited to, the authority to administer oaths and affirmations and to subpoena and examine witnesses.

(c) *Recusal.* Upon the motion of a party, or upon the Judge's own initiative, a Judge will promptly recuse himself or herself from further participation in a case whenever disqualification is appropriate due to conflict of interest, bias, or some other significant reason. A denial of a motion for recusal may be appealed within 5 days to the AA/OHA, or to the Administrative Law Judge if the AA/OHA is the Judge, but that appeal will not stay proceedings in the case.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47441, Aug. 6, 2010]

§ 134.219 Sanctions.

(a) A Judge may impose appropriate sanctions, except for fees, costs, or monetary penalties, which he or she deems necessary to serve the ends of justice, if a party or its attorney:

- (1) Fails to comply with an order of the Judge;
- (2) Fails to comply with the rules set forth in this part;
- (3) Acts in bad faith or for purposes of delay or harassment;
- (4) Submits false statements knowingly, recklessly, or with deliberate disregard for the truth; or
- (5) Otherwise acts in an unethical or disruptive manner.

(b) Appropriate sanctions may include:

- (1) Ordering a pleading or evidentiary filing to be struck from the record;
- (2) Dismissing an appeal with prejudice;
- (3) Suspending counsel from practice before OHA;
- (4) Filing a complaint with the applicable State bar; and

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(5) Taking any other action that is appropriate to further the administration of justice.

[75 FR 47441, Aug. 6, 2010]

§ 134.220 Prohibition against *ex parte* communications.

No person shall consult or communicate with a Judge concerning any fact, question of law, or SBA policy relevant to the merits of a case before that Judge except on prior notice to all parties, and with the opportunity for all parties to participate. In the event of such prohibited consultation or communication, the Judge will disclose the occurrence in accordance with 5 U.S.C. 557(d)(1), and may impose such sanctions as he or she deems appropriate.

§ 134.221 Prehearing conferences.

Prior to a hearing, the Judge, at his or her own initiative, or upon the motion of any party, may direct the parties or their attorneys to appear, by telephone or in person, in order to consider any matter which may assist in the efficient, prompt, and fair determination of the case. The conference may be recorded verbatim at the discretion of the Judge, and, if so, a party may purchase a transcript, at its own expense, from the recording service.

§ 134.222 Oral hearing.

(a) *Availability.* A party may obtain an oral hearing only if:

(1) It is required by regulation; or

(2) Following the motion of a party, or at his or her own initiative, the Judge orders an oral hearing upon concluding that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses.

(b) *Place and time.* The place and time of oral hearings is within the discretion of the Judge, who shall give due regard to the necessity and convenience of the parties, their attorneys, and witnesses. The Judge may direct that an oral hearing be conducted by telephone.

(c) *Public access.* Unless otherwise ordered by the Judge, all oral hearings are public.

(d) *Payment of subpoenaed witnesses.* A party who obtains a witness's presence

at an oral hearing by subpoena must pay to that witness the fees and mileage costs to which the witness would be entitled in Federal court.

(e) *Recording.* Oral hearings will be recorded verbatim. A transcript of a recording may be purchased by a party, at its own expense, from the recording service.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998; 70 FR 17587, Apr. 7, 2005; 75 FR 47442, Aug. 6, 2010]

§ 134.223 Evidence.

(a) *Federal Rules of Evidence.* Unless contrary to a particular rule in this part, or an order of the Judge, the Federal Rules of Evidence will be used as a general guide in all cases before OHA.

(b) *Hearsay.* Hearsay evidence is admissible if it is deemed by the Judge to be relevant and reliable. Weight to be afforded hearsay evidence is at the discretion of the Judge.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47442, Aug. 6, 2010]

§ 134.224 [Reserved]

§ 134.225 The record.

(a) *Contents.* The record of a case before OHA will consist of all pleadings, motions, and other non-evidentiary submissions, all admitted evidence, all orders and decisions, and any transcripts of proceedings in the case.

(b) *Closure.* The Judge will set the date upon which the pre-decisional record of the case will be closed, and after which no additional evidence or argument will be accepted.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47442, Aug. 6, 2010]

§ 134.226 The decision.

(a) *Contents.* (1) Following close of record, the Judge will issue a decision containing findings of fact and conclusions of law, the reasons for such findings and conclusions, and any relief ordered. The record will constitute the exclusive basis for a decision.

(2) An OHA decision creates precedent, unless:

(i) Another regulation in this chapter applicable to a specific type of appeal provides that the OHA decision does not create precedent; or

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(ii) the decision is designated as one not to be cited as precedent.

(3) A summary decision containing only cursory findings of fact and conclusions of law may be issued only if the Judge finds a full decision will not advance understanding of Federal statutes or applicable regulations, policies, or procedures and the underlying facts and law are of a routine and non-complex nature.

(b) *Time limits.* Decisions pertaining to the collection of debts owed to SBA and the United States under the Debt Collection Act of 1982, the Debt Collection Improvement Act of 1996, and Part 140 of this chapter must be made within 60 days after a petition is filed. Time limits for decisions in other types of cases, if any, are indicated either in the applicable program regulations or in other subparts of this part 134.

(c) *Service.* OHA will serve a copy of all written decisions on:

(1) Each party, or, if represented by counsel, on its counsel; and

(2) SBA's General Counsel, or his or her designee, if SBA is not a party.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002; 70 FR 17587, Apr. 7, 2005; 75 FR 47442, Aug. 6, 2010]

§ 134.227 Finality of decisions.

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

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

(1) Collection of debts owed to SBA and the United States under the Debt Collection Act of 1982, Debt Collection Improvement Act of 1996, and part 140 of this chapter;

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

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

(4) Size Standard Petitions; and

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

(c) *Reconsideration.* Except as otherwise provided by statute, the applicable program regulations in this chapter, or this part 134, an initial or final decision of the Judge may be reconsidered. Any party in interest, including SBA where SBA did not appear as a party during the proceeding that led to the issuance of the Judge's decision, may request reconsideration by filing with the Judge and serving a petition for reconsideration within 20 days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

[67 FR 47249, July 18, 2002, as amended at 70 FR 17587, Apr. 7, 2005; 81 FR 48595, July 25, 2016; 82 FR 25507, June 2, 2017]

§ 134.228 Review of initial decisions.

(a) *Request for review.* Within 30 days after the service of an initial decision or a reconsidered initial decision of a Judge, any party, or SBA's Office of General Counsel, may file and serve a request for review by the Administrator. A request for review must set forth the filing party's specific objections to the initial decision, and any alleged support for those objections in the record, or in case law, statute, regulation, or SBA policy. A party must serve its request for review upon all other parties and upon SBA's Office of General Counsel.

(b) *Response.* Within 20 days after the service of a request for review, any party, or SBA's Office of General Counsel, may file and serve a response. A party must serve its response upon all other parties and upon SBA's Office of General Counsel.

(c) *Transfer of the record.* Upon receipt of all responses, or 30 days after the filing of a request for review, whichever is earlier, OHA will transfer the record of the case to the Administrator. The Administrator, or his or her designee, will then review the record.

(d) *Standard of review.* Upon review, the Administrator, or his or her designee, will sustain the initial decision

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unless it is based on an erroneous finding of fact or an erroneous interpretation or application of case law, statute, regulation, or SBA policy.

(e) *Order.* The Administrator, or his or her designee, will:

(1) Affirm, reverse, or modify the initial decision, which determination will become the final decision of the SBA upon issuance; or

(2) Remand the initial decision to the Judge for appropriate further proceedings.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002]

§ 134.229 Termination of jurisdiction.

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

[67 FR 47249, July 18, 2002]

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

§ 134.301 Scope of the rules in this subpart C.

The rules of practice in this subpart C apply to all appeals to OHA from:

(a) Formal size determinations made by an SBA Government Contracting Area Office, under part 121 of this chapter, or by a Disaster Area Office, in connection with applications for disaster loans; and

(b) NAICS code designations, pursuant to part 121 of this chapter.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002]

§ 134.302 Who may appeal.

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

(a) Any person adversely affected by a size determination;

(b) Any person adversely affected by a NAICS code designation. However, with respect to a particular sole source 8(a) contract, only the Director, Office of Business Development may appeal a NAICS code designation;

(c) The Associate or Assistant Administrator for the SBA program involved, through SBA's Office of General Counsel; or

(d) The procuring agency contracting officer responsible for the procurement affected by a size determination.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002; 74 FR 45754, Sept. 4, 2009; 75 FR 47442, Aug. 6, 2010]

§ 134.303 Advisory opinions.

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

[67 FR 47249, July 18, 2002]

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

(a) Size appeals must be filed within 15 calendar days after receipt of the formal size determination.

(b) NAICS code appeals must be filed within 10 calendar days after issuance of the solicitation, or amendment to the solicitation affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers or bids are due.

(c) An untimely appeal will be dismissed.

[76 FR 5685, Feb. 2, 2011]

§ 134.305 The appeal petition.

(a) *Form.* There is no required format for an appeal petition. However, it must include the following information:

(1) In a size appeal, a copy of the size determination being appealed;

(2) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;

(3) A full and specific statement as to why the size determination or NAICS code designation is alleged to be in error, together with argument supporting such allegations; and

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

(b) *Service of size determination appeals.* The appellant must serve the appeal petition upon each of the following:

(1) The SBA official who issued the size determination;

(2) The contracting officer responsible for the procurement affected by a size determination;

(3) The business concern whose size status is at issue;

(4) All persons who filed protests; and

(5) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205-6873, or e-mail at *OPLService@sba.gov*.

(c) *Service of NAICS appeals.* The appellant must serve:

(1) The contracting officer who made the NAICS code designation; and

(2) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205-6873, or e-mail at *OPLService@sba.gov*.

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

(e) *Dismissal.* An appeal petition which does not contain all of the information required in paragraph (a) of this section may be dismissed, with or without prejudice, by the Judge at his or her own initiative, or upon motion of a respondent.

[61 FR 2683, Jan. 29, 1996, as amended at 65 FR 57542, Sept. 25, 2000; 67 FR 47250, July 18, 2002; 69 FR 29208, May 21, 2004; 75 FR 47442, Aug. 6, 2010]

§ 134.306 Transmission of the case file and solicitation.

(a) Upon receipt of an appeal petition pertaining to a size determination, the Area Office which issued the size determination must immediately send to OHA the entire case file relating to that determination.

(b) Upon receipt of an appeal petition pertaining to a NAICS code designation, or a size determination made in connection with a particular procure-

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ment, the procuring agency contracting officer must immediately send to OHA an electronic link to or a paper copy of both the original solicitation relating to that procurement and all amendments.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002; 75 FR 47442, Aug. 6, 2010]

§ 134.307 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

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

(a) Evidence not previously presented to the Area Office which issued the size determination being appealed will not be considered by a Judge unless:

(1) The Judge, on his or her own initiative, orders the submission of such evidence; or

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

(b) If the submission of evidence is ordered by a Judge, and the party in possession of that evidence does not submit it, the Judge may draw adverse inferences against that party.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002]

§ 134.309 Response to an appeal petition.

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

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

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(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.305.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002]

§ 134.310 Discovery.

Discovery will not be permitted in appeals from size determinations or NAICS code designations.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002]

§ 134.311 Oral hearings.

Oral hearings will not be held in appeals from NAICS code designations, and will be held in appeals from size determinations only upon a finding by the Judge of extraordinary circumstances. If such an oral hearing is ordered, the proceeding shall be conducted in accordance with those rules of subpart B of this part as the Judge deems appropriate.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002]

§ 134.312 Evidence.

To the extent the rules in this subpart permit the submission of evidence, the provisions of § 134.223 (a) and (b) apply.

§ 134.313 Applicability of subpart B provisions.

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

[67 FR 47250, July 18, 2002]

§ 134.314 Standard of review and burden of proof.

The standard of review is whether the size determination or NAICS code designation was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the

evidence, in both size and NAICS code appeals.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002; 69 FR 29209, May 21, 2004]

§ 134.315 The record.

Where relevant, the provisions of § 134.225 apply. In an appeal under this subpart, the contents of the record also include the case file or solicitation submitted to OHA in accordance with § 134.306.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47442, Aug. 6, 2010]

§ 134.316 The decision.

(a) The Judge shall issue a size appeal decision, insofar as practicable, within 60 calendar days after close of the record.

(b) The Judge shall issue a NAICS code appeal decision as soon as practicable after close of the record.

(c) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered. The Judge will not decide substantive issues raised for the first time on appeal, or which have been abandoned or become moot.

(d) *Finality.* The decision is the final decision of the SBA and becomes effective upon issuance. Where a size appeal is dismissed, the Area Office size determination remains in effect.

(e) *Service.* OHA will serve a copy of all written decisions on:

(1) Each party, or, if represented by counsel, on its counsel; and

(2) SBA's General Counsel, or his or her designee, if SBA is not a party.

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

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002; 69 FR 29209, May 21, 2004; 76 FR 5685, Feb. 2, 2011]

§ 134.317 [Reserved]**§ 134.318 NAICS appeals.**

(a) *General.* The regulations at §§ 121.402, 121.1102, and 121.1103 of this chapter also apply to NAICS code appeals.

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(b) *Effect of OHA's decision.* If OHA grants the appeal (changes the NAICS code), the contracting officer must amend the solicitation to reflect the new NAICS code. The decision will also apply to future solicitations for the same supplies or services.

(c) *Summary dismissal.* OHA may summarily dismiss a NAICS appeal either on the Judge's own initiative or on motion by a party. A summary dismissal may be with or without prejudice, and may be issued before the date set for close of record. Grounds for summary dismissal include: premature appeal, withdrawn appeal, settlement, cancellation of the procurement, and contract award.

[75 FR 47442, Aug. 6, 2010, as amended at 85 FR 66199, Oct. 16, 2020]

Subpart D—Rules of Practice for Appeals Under the 8(a) Program

SOURCE: 63 FR 35766, June 30, 1998, unless otherwise noted.

§ 134.401 Scope of the rules in this subpart D.

The rules of practice in this subpart D apply to all appeals to OHA from:

- (a) Denials of 8(a) BD program admission based solely on a negative finding(s) of social disadvantage, economic disadvantage, ownership or control pursuant to § 124.206 of this title;
- (b) Early graduation pursuant to §§ 124.302 and 124.304;
- (c) Termination pursuant to §§ 124.303 and 124.304;
- (d) Denials of requests to issue a waiver pursuant to § 124.515; and
- (e) Suspensions pursuant to § 124.305(a).

§ 134.402 Appeal petition.

In addition to the requirements of § 134.203, an appeal petition must state, with specific reference to the determination and the record supporting such determination, the reasons why the determination is alleged to be arbitrary, capricious or contrary to law. This section does not apply to suspension appeals. For suspensions, see § 124.305 of this chapter.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47250, July 18, 2002]

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§ 134.403 Service of appeal petition.

Concurrent with its filing with OHA, the petitioner also must serve separate copies of the petition, including attachments, on two SBA officials.

(a) All 8(a) appeals must be served to: Director, Office of Business Development, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205-5206, or e-mail at *8aBD2@sba.gov*.

(b)(1) Appeals of early graduation or termination also must be served to: Associate General Counsel for Litigation, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205-7415, or e-mail at *OLITService@sba.gov*.

(2) Appeals of denial of program admission, suspension of program assistance, or denial of a request for waiver also must be served to: Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205-6873, or e-mail at *OPLService@sba.gov*.

[75 FR 47442, Aug. 6, 2010]

§ 134.404 Deadline for filing appeal petition.

An 8(a) appeal petition must be filed within 45 calendar days after receipt of the SBA determination being appealed.

[75 FR 47442, Aug. 6, 2010]

§ 134.405 Jurisdiction.

(a) The Administrative Law Judge selected to preside over an appeal shall decline to accept jurisdiction over any matter if:

(1) The appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination, including appeals of denials of 8(a) BD program admission based in whole or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control;

(2) The appeal is untimely filed or is not otherwise filed in accordance with the requirements of this subpart or the requirements in subparts A and B of this part; or

(3) The matter has been decided or is the subject of an adjudication before a

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court of competent jurisdiction over such matters.

(b) Once the Administrative Law Judge accepts jurisdiction over an appeal, subsequent initiation of an adjudication of the matter by a court of competent jurisdiction will not preclude the Administrative Law Judge from rendering a final decision on the matter.

(c) Jurisdiction of the Administrative Law Judge in a suspension case is limited to the issue of whether the protection of the Government's interest requires suspension pending resolution of the termination action, unless the Administrative Law Judge has consolidated the suspension appeal with the corresponding termination appeal.

[63 FR 35766, June 30, 1998; 75 FR 47443, Aug. 6, 2010]

§ 134.406 Review of the administrative record.

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

(b) Except in suspension appeals, the Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is not arbitrary, capricious or contrary to law, the Administrative Law Judge must uphold it on appeal.

(1) The Administrative Law Judge must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

(2) If the SBA's path of reasoning may reasonably be discerned, the Administrative Law Judge will uphold a decision of less than ideal clarity.

(c) *The administrative record.* (1) The administrative record must contain all documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied. The administrative record, how-

ever, need not contain all documents pertaining to the petitioner. For example, the administrative record in a termination proceeding need not include the Participant's entire business plan file, documents pertaining to specific 8(a) contracts, or the firm's application for participation in the 8(a) BD program if they are unrelated to the termination action. The SBA may claim privilege as to certain materials.

(2) The petitioner may object to the absence of a document, previously submitted to, or sent by, SBA, which the petitioner believes was erroneously omitted from the administrative record. The petitioner also may object to a claim of privilege made by the SBA. The petitioner's objections must be filed and served no later than 10 days of its receipt of the administrative record.

(3) In the absence of any objection by the petitioner or a finding by the Judge pursuant to paragraph (e) of this section that the record is insufficiently complete to decide whether the determination was arbitrary, capricious, or contrary to law, the administrative record submitted by SBA shall be deemed complete.

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

(e) *Remand.* (1) The Administrative Law Judge may remand a case to the Director, Office of Business Development (or, in the case of a denial of a request for waiver under § 124.515 of this chapter, to the Administrator) for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious, or contrary to law. In the event of such a remand, the Judge will not require the SBA to supplement the administrative record other than to supply the reason or reasons for the determination and any documents submitted to, or considered

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by, SBA in connection with any reconsideration permitted by regulation that occurs during the remand period. After such a remand, in the event the Judge finds that the reasons upon which the determination is based are absent from any supplemented record, the Judge will find the SBA determination to be arbitrary, capricious, or contrary to law.

(2) The Administrative Law Judge may also remand a case to the Director, Office of Business Development (or, in the case of a denial of a request for waiver under § 124.515 of this chapter, to the Administrator) for further consideration where it is clearly apparent from the record that SBA made an erroneous factual finding (e.g., SBA double counted an asset of an individual claiming disadvantaged status) or a mistake of law (e.g., SBA applied the wrong regulatory provision in evaluating the case).

(3) The Administrative Law Judge may remand an eligibility, early graduation, or termination appeal to the Director, Office of Business Development, where the determination raises a new ground that was not in the initial SBA determination.

(4) A remand under this section will be for a reasonable period.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47250, July 18, 2002; 74 FR 45754, Sept. 4, 2009; 75 FR 47443, Aug. 6, 2010; 81 FR 48595, July 25, 2016]

§ 134.407 Evidence beyond the record and discovery.

(a) Except in suspension appeals, the Administrative Law Judge may not admit evidence beyond the written administrative record nor permit any form of discovery unless he or she first determines that the petitioner, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.

(1) Prior to any such determination, the Administrative Law Judge must permit SBA to respond in writing to any allegations of bad faith or improper behavior.

(2) Upon a determination by the Administrative Law Judge that the peti-

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tioner has made such a substantial showing, the Administrative Law Judge may permit appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior.

(b) A determination by the Administrative Law Judge that the required showing set forth in paragraph (a) of this section has been made does not shift the burden of proof, which continues to rest with the petitioner.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47251, July 18, 2002]

§ 134.408 Summary decision.

(a) *Generally.* In any appeal under this subpart D, either party may move or cross-move for summary decision, as provided in § 134.212.

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

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

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

[67 FR 47251, July 18, 2002]

§ 134.409 Decision on appeal.

(a) A decision of the Administrative Law Judge under this subpart is the final agency decision, and is binding on the parties.

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(b) The Administrative Law Judge shall issue a decision, insofar as practicable, within 90 days after an appeal petition is filed.

(c) The Administrative Law Judge may reconsider an appeal decision within 20 days of the decision if there is a clear showing of an error of fact or law material to the decision.

[63 FR 35766, June 30, 1998. Redesignated and amended at 67 FR 47251, July 18, 2002]

Subpart E—[Reserved]

Subpart F—Implementation of the Equal Access to Justice Act

SOURCE: 61 FR 2683, Jan. 29, 1996, unless otherwise noted. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005.

§ 134.601 What is the purpose of this subpart?

The Equal Access to Justice Act, 5 U.S.C. 504, establishes procedures by which prevailing parties in certain administrative proceedings may apply for reimbursement of fees and other expenses. Eligible parties may receive awards when they prevail over SBA, unless SBA's position in the proceeding was "substantially justified" or, as provided in § 134.605(b), special circumstances make an award unjust. The rules of this subpart explain which OHA proceedings are covered, who may be eligible for an award of fees and expenses, and how to apply for such an award.

[61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005, as amended at 75 FR 47443, Aug. 6, 2010]

§ 134.602 Under what circumstances may I apply for reimbursement?

You may apply for reimbursement under this subpart if you meet the eligibility requirements in § 134.606 and you prevail over SBA in a final decision in:

(a) The type of administrative proceeding which qualifies as an "adversary adjudication" under § 134.603; or

(b) An ancillary or subsidiary issue in that administrative proceeding that is sufficiently significant and discrete to merit treatment as a separate unit; or

(c) A matter which the agency orders to be determined as an "adversary adjudication" under 5 U.S.C. 554.

[61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005, as amended at 75 FR 47443, Aug. 6, 2010]

§ 134.603 What is an adversary adjudication?

For purposes of this subpart, adversary adjudications are administrative proceedings before OHA which involve SBA as a party and which are required to be conducted by an Administrative Law Judge ("ALJ"). These adjudications ("administrative proceedings") include those proceedings listed in § 134.102(a), (i), and (j)(1), but do not include other OHA proceedings such as those listed in § 134.102(k). In order for an administrative proceeding to qualify, SBA must have been represented by counsel or by another representative who enters an appearance and participates in the proceeding.

§ 134.604 What benefits may I claim?

You may seek reimbursement for certain reasonable fees and expenses incurred in prosecuting or defending a claim in an administrative proceeding.

§ 134.605 Under what circumstances are fees and expenses reimbursable?

(a) If you are a prevailing eligible party, you may receive an award for reasonable fees and expenses unless the position of the agency in the proceeding is found by the ALJ to be "substantially justified", or special circumstances exist which make an award unjust. The "position of the agency" includes not only the position taken by SBA in the administrative proceeding, but also the position which it took in the action which led to the administrative proceeding. No presumption arises that SBA's position was not substantially justified simply because it did not prevail in a proceeding. However, upon your assertion that the position of SBA was not substantially justified, SBA will be required to establish that its position was reasonable in fact and law.

(b) The ALJ may reduce or deny an award for reimbursement if you have

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unreasonably protracted the administrative proceeding or if other special circumstances would make the award unjust.

(c) Awards for fees and expenses incurred before the date on which an administrative proceeding was initiated are allowable only if you can demonstrate that they were reasonably incurred in preparation for the proceeding.

§ 134.606 Who is eligible for possible reimbursement?

(a) You are eligible for possible reimbursement if:

(1) You are an individual, owner of an unincorporated business, partnership, corporation, association, organization, or unit of local government; and

(2) You are a party, as defined in 5 U.S.C. 551(3); and

(3) You are the prevailing party; and

(4) You meet certain net worth and employee eligibility requirements set forth in § 134.607.

(b) You are not eligible for possible reimbursement if you participated in the administrative proceeding only on behalf of persons or entities that are ineligible.

[61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005, as amended at 75 FR 47443, Aug. 6, 2010]

§ 134.607 How do I know which eligibility requirement applies to me?

Follow this chart to determine your eligibility. You should calculate your net worth and the number of your employees as of the date the administrative proceeding was initiated.

If your participation in the proceeding was:	Eligibility requirements:
(1) As an individual rather than a business owner.	(1) Personal net worth may not exceed 2 million dollars.
(2) As owner of an unincorporated business.	(2) Personal net worth may not exceed 7 million dollars, and No more than 500 employees.
(3) As a partnership, corporation, association, organization, or unit of local government.	(3) Business net worth may not exceed 7 million dollars, and No more than 500 employees.
(4) As a charitable or other tax-exempt organization described in 26 U.S.C. 501(c)(3) or a cooperative association as defined in 12 U.S.C. 1141j(a).	(4) No net worth limitations, and No more than 500 employees.

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§ 134.608 What are the special rules for calculating net worth and number of employees?

(a) Your net worth must include the value of any assets disposed of for the purpose of meeting an eligibility standard, and must exclude any obligation incurred for that purpose. Transfers of assets, or obligations incurred, for less than reasonably equivalent value will be presumed to have been made for the purpose of meeting an eligibility standard.

(b) If you are an owner of an unincorporated business, or a partnership, corporation, association, organization, or unit of local government, your net worth must include the net worth of all of your affiliates. "Affiliates" are:

(1) Corporations or other business entities which directly or indirectly own or control a majority of the voting shares or other ownership interests in the applicant concern; and

(2) Corporations or other business entities in which the applicant concern directly or indirectly owns or controls a majority of the voting shares or other ownership interests.

(c) Your employees include all those persons regularly working for you at the time the administrative proceeding was initiated, whether or not they were at work on that date. Part-time employees must be included on a proportional basis. You must include the employees of all your affiliates in your total number of employees.

§ 134.609 What is the difference between a fee and an expense?

A fee is a charge to you for the professional services of attorneys, agents, or expert witnesses rendered in connection with your case. An expense is the cost to you of any study, analysis, engineering report, test, project, or similar matter prepared in connection with your case.

§ 134.610 Are there limitations on reimbursement for fees and expenses?

(a) Awards will be calculated on the basis of fees and expenses actually incurred. If services were provided by one or more of your employees, or were made available to you free, you may not seek an award for those services. If services were provided at a reduced

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rate, fees and expenses will be calculated at that reduced rate.

(b) In determining the reasonableness of the fees for attorneys, agents or expert witnesses, the ALJ will consider at least the following:

(1) That provider's customary fee for like services;

(2) The prevailing rate for similar services in the community in which that provider ordinarily performs services;

(3) The time actually spent in representing you; and

(4) The time reasonably spent in light of the difficulty and complexity of the issues.

(c) An award for the fees of an attorney or agent may not exceed \$75 per hour, and an award for the fees of an expert witness may not exceed \$25 per hour, regardless of the rate charged.

(d) An award for the reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on your behalf may not exceed the prevailing rate payable for similar services, and you may be reimbursed only if the study or other matter was necessary to the preparation of your case.

§ 134.611 What should I include in my application for an award?

(a) Your application must be in the form of a written petition which is served and filed in accordance with § 134.204. It must contain the following information:

(1) A statement that OHA has jurisdiction over the case pursuant to § 134.102(g);

(2) Identification of the administrative proceeding for which you are seeking an award;

(3) A statement that you have prevailed, and a list of each issue in which you claim the position of SBA was not substantially justified;

(4) Your status as an individual, owner of an unincorporated business, partnership, corporation, association, organization, or unit of local government;

(5) Your net worth and number of employees as of the date the administrative proceeding was initiated, or a statement that one or both of these eli-

gibility requirements do not apply to you;

(6) The amount of fees and expenses you are seeking, along with the invoice or billing statement from each service provider;

(7) A description of any affiliates (as that term is defined in § 134.608), or a statement that no affiliates exist;

(8) A statement that the application and any attached statements and exhibits are true and complete to the best of your knowledge and that you understand a false statement on these documents is a felony punishable by fine and imprisonment under 18 U.S.C. 1001; and

(9)(i) Your name and address;

(ii) Your signature, or the signature of either a responsible official or your attorney; and

(iii) The address and telephone number of the person who signs the application.

(b) You should follow this chart to determine which further documents must be included with your application:

Party	Required documents
(1) Individual, owner of unincorporated business, partnership, corporation, association, organization, or unit of local government.	(1) Net worth exhibit.
(2) Organization qualified as tax-exempt under 26 U.S.C. 501(c)(3).	(2) Copy of a ruling by the Internal Revenue Service that you qualify as a 501(c)(3) organization or Statement that you were listed in the current edition of IRS Bulletin 78 as of the date the administrative proceeding was initiated.
(3) Tax-exempt religious organization not required to obtain a ruling from the Internal Revenue Service on its exempt status.	(3) Description of your organization and the basis for your belief you are exempt.
(4) Cooperative association as defined in 12 U.S.C. 1141j(a).	(4) Copy of your charter or articles of incorporation, and Copy of your bylaws.

[61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005, as amended at 75 FR 47443, Aug. 6, 2010]

§ 134.612 What must a net worth exhibit contain?

(a) A net worth exhibit may be in any format, but it must contain:

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(1) List of all assets and liabilities for you and each affiliate in detail sufficient to show your eligibility;

(2) Aggregate net worth for you and all affiliates; and

(3) Description of any transfers of assets from, or obligations incurred by, you or your affiliates within one year prior to the initiation of the administrative proceeding which reduced your net worth below the eligibility ceiling, or a statement that no such transfers occurred.

(b) The net worth exhibit must be filed with your application, but will not be part of the public record of the proceeding. Further, in accordance with the provisions of § 134.204(g), you need not serve your net worth exhibit on other parties.

§ 134.613 What documentation do I need for fees and expenses?

You must submit a separate itemized statement or invoice for the services of each provider for which you seek reimbursement. Each separate statement or invoice must contain:

(a) The hours worked in connection with the proceeding by each provider supplying a billable service;

(b) A description of the specific services performed by each provider;

(c) The rate at which fees were computed for each provider;

(d) The total charged by the provider on that statement or invoice; and

(e) The provider's verification that the statement or invoice is true to the best of his or her knowledge and that he or she understands that a false statement is punishable by fine and imprisonment under 18 U.S.C. 1001.

§ 134.614 What deadlines apply to my application for an award and where do I send it?

After you have prevailed in an administrative proceeding or in a discrete issue therein, you must serve, and file with OHA, your written application for an award, and its attachments, no later than 30 days after the decision in the administrative proceeding becomes final under § 134.227. The deadline for filing an application for an award may not be extended. If SBA or another party requests review of the decision in the underlying ad-

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ministrative proceeding, your request for an award for fees and expenses may still be filed, but it will not be considered by the ALJ until a final decision is rendered.

§ 134.615 How will proceedings relating to my application for fees and expenses be conducted?

Proceedings will be conducted in accordance with the provisions in subpart B of this part.

§ 134.616 How will I know if I receive an award?

The ALJ will issue an initial decision on the merits of your request for an award which will become final in 30 days unless a request for review is filed under § 134.228. The decision will include findings on your eligibility, on whether SBA's position was substantially justified, and on the reasonableness of the amount you requested. Where applicable, there will also be findings on whether you have unduly protracted the proceedings or whether other circumstances make an award unjust, and an explanation of the reason for the difference, if any, between the amount requested and the amount awarded. If you have sought an award against more than one federal agency, the decision will allocate responsibility for payment among the agencies with appropriate explanation.

§ 134.617 May I seek review of the ALJ's decision on my award?

You may request review of the ALJ's decision on your award by filing a request for review in accordance with § 134.228. You may seek judicial review of a final decision as provided in 5 U.S.C. 504(c)(2).

§ 134.618 How are awards paid?

If you are seeking payment of an award, you must submit a copy of the final decision, along with your certification that you are not seeking judicial review of either the decision in the adversary adjudication, or of the award, to the following address: Chief Financial Officer, Office of Financial Operations, SBA, P.O. Box 205, Denver, CO 80201-0205. SBA will pay you the

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amount awarded within 60 days of receipt of your request unless it is notified that you or another party has sought judicial review of the underlying decision or the award.

Subpart G—Rules of Practice for Appeals From Women-Owned Small Business Concern (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests

SOURCE: 75 FR 62292, Oct. 7, 2010, unless otherwise noted.

§ 134.701 What is the scope of the rules in this subpart G?

(a) The rules of practice in this subpart G apply to all appeals to OHA from formal protest determinations made by the Director for Government Contracting (D/GC) in connection with a Women-Owned Small Business Concern (WOSB) or Economically Disadvantaged WOSB Concern (EDWOSB) protest. Appeals under this subpart include issues related to whether the concern is owned and controlled by one or more women who are United States citizens and, if the appeal is in connection with an EDWOSB contract, that the concern is at least 51 percent owned and controlled by one or more women who are economically disadvantaged. This includes appeals from determinations by the D/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by subpart C of this part.

§ 134.702 Who may appeal?

Appeals from WOSB or EDWOSB protest determinations may be filed with OHA by the protested concern, the protestor, or the contracting officer responsible for the procurement affected by the protest determination.

§ 134.703 When must a person file an appeal from an WOSB or EDWOSB protest determination?

Appeals from a WOSB or EDWOSB protest determination must be commenced by filing and serving an appeal petition within ten (10) business days after the appellant receives the WOSB or EDWOSB protest determination (see § 134.204 for filing and service requirements). An untimely appeal must be dismissed.

§ 134.704 What are the effects of the appeal on the procurement at issue?

Appellate decisions apply to the procurement in question. If a timely OHA appeal has been filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered. If OHA affirms the D/GC's determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract, not exercise the next option or not award further task or delivery orders. If OHA overturns the D/GC's dismissal or determination that the concern is an eligible EDWOSB or WOSB, the contracting officer may apply the OHA decision to the procurement in question.

§ 134.705 What are the requirements for an appeal petition?

(a) *Format.* There is no required format for an appeal petition. However, it must include the following information:

(1) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;

(2) A statement that the petitioner is appealing a WOSB or EDWOSB protest determination issued by the D/GC and the date that the petitioner received it;

(3) A full and specific statement as to why the WOSB or EDWOSB protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation; and

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

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(b) *Service of appeal.* The appellant must serve the appeal petition upon each of the following:

(1) The D/GC at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile (202) 205-6390;

(2) The contracting officer responsible for the procurement affected by a WOSB or EDWOSB determination;

(3) The protested concern (the business concern whose WOSB or EDWOSB status is at issue) or the protester; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile number (202) 205-6873.

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

§ 134.706 What are the service and filing requirements?

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart.

§ 134.707 When does the D/GC transmit the protest file and to whom?

Upon receipt of an appeal petition, the D/GC will send to OHA a copy of the protest file relating to that determination. The D/GC will certify and authenticate that the protest file, to the best of his or her knowledge, is a true and correct copy of the protest file.

§ 134.708 What is the standard of review?

The standard of review for an appeal of a WOSB or EDWOSB protest determination is whether the D/GC's determination was based on clear error of fact or law.

§ 134.709 When will a Judge dismiss an appeal?

(a) The presiding Judge must dismiss the appeal if the appeal is untimely filed under § 134.703.

(b) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over

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such matters. However, once an appeal has been filed, initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

§ 134.710 Who can file a response to an appeal petition and when must such a response be filed?

Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. If a person decides to file a response, the response must be filed within seven (7) business days after service of the appeal petition. The response should present argument.

§ 134.711 Will the Judge permit discovery and oral hearings?

Discovery will not be permitted, and oral hearings will not be held.

§ 134.712 What are the limitations on new evidence?

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto.

§ 134.713 When is the record closed?

The record will close when the time to file a response to an appeal petition expires pursuant to § 134.710.

§ 134.714 When must the Judge issue his or her decision?

The Judge shall issue a decision, insofar as practicable, within fifteen (15) business days after close of the record. The Judge's decision is the final agency decision and becomes effective upon issuance.

[75 FR 62292, Oct. 7, 2010, as amended at 85 FR 63193, Oct. 7, 2020]

§ 134.715 Can a Judge reconsider his decision?

(a) The Judge may reconsider an appeal decision within twenty (20) calendar days after issuance of the written decision. Any party who has appeared in the proceeding, or SBA, may

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request reconsideration by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

(b) The Judge may remand a proceeding to the D/GC for a new WOSB or EDWOSB determination if the D/GC fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new WOSB or EDWOSB determination.

Subpart H—Rules of Practice for Employee Disputes

SOURCE: 75 FR 47443, Aug. 6, 2010, unless otherwise noted.

§ 134.801 Scope of rules.

(a) The rules of practice in this subpart H apply to the OHA appeal under the Employee Dispute Resolution Process (EDRP). Standard Operating Procedure (SOP) 37 71 sets out the EDRP. It is available at <http://www.sba.gov/tools/resourcelibrary/sops/index.html> or through OHA's Web site <http://www.sba.gov/oha>.

(b) The following rules, located in subparts A and B of this part, also apply to OHA appeals under the EDRP:

- (1) Definitions (§ 134.101);
- (2) Jurisdiction of OHA (§ 134.102(r) only);
- (3) Scope of the rules in this subpart B (§ 134.201(a), (b)(6), and (c) only);
- (4) Commencement of cases (§ 134.202(d) only, on deadlines and how to count days);
- (5) Filing and service requirements (§ 134.204);
- (6) Amendments and supplemental pleadings (§ 134.207);
- (7) Requirement of signature (§ 134.209);
- (8) Motions (§ 134.211);
- (9) Summary decision (§ 134.212); and

(10) Sanctions (§ 134.219).

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.802 [Reserved]

§ 134.803 Commencement of appeals from SBA Employee Dispute Resolution Process cases (Employee Disputes).

(a) An appeal from a Step Two decision must be commenced by filing an appeal petition within 15 calendar days from the date the Employee receives the Step Two decision.

(b) If the Step Two Official does not issue a decision within 15 calendar days of receiving the SBA Dispute Form from the Employee, the Employee must file his/her appeal petition at OHA no later than 15 calendar days from the date the Step Two decision was due.

(c) The rule for counting days is in § 134.202(d).

(d) OHA will dismiss an untimely appeal.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.804 The appeal petition.

(a) *Form.* There is no required format for an appeal petition. However, it must include the following:

(1) The completed SBA Dispute Form;

(2) A copy of the Step One and Step Two decisions, if any;

(3) Statement of why the Step Two decision (or Step One decision, if no Step Two decision was received), is alleged to be in error;

(4) Any other pertinent information the OHA Judge should consider;

(5) A request for mediation, if applicable; and

(6) If represented by an attorney, the attorney's contact information and signature.

(b) *Service of the appeal petition upon the SBA.* The Employee must serve copies of the entire appeal petition upon three SBA officials:

(1) The Step Two Official;

(2) Chief Human Capital Officer, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; and

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(3) Associate General Counsel for General Law, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, e-mail: *OGLService@sba.gov*, except that an employee of the Office of Inspector General (OIG) must serve it upon the Counsel to the Inspector General, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, e-mail: *ig.counseldiv@sba.gov*.

(c) The rules governing filing and service are in § 134.204.

(d) *Dismissal.* An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge at his or her own initiative or upon motion of the SBA.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.805 After the appeal petition is filed.

(a) The AA/OHA will assign a Judge to adjudicate the case. If mediation is requested or offered, the AA/OHA will assign a different person to mediate the case.

(b) OHA will issue and serve upon the Employee and the SBA a notice and order informing the parties that an appeal has been filed, and setting the date for SBA's response and the close of record.

(c) The rules for amendments to pleadings and supplemental pleadings are in § 134.207.

(d) Unless otherwise instructed, OHA will serve all orders and the decision by email upon the Employee, or upon the attorney if represented by an attorney.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.806 Mediation.

Either the Employee or the SBA may request mediation, or OHA may offer mediation. OHA may designate a Judge or an OHA attorney to serve as a mediator. If the parties reach a settlement through mediation, they may file a joint motion to dismiss the appeal based on that settlement. If the parties do not reach a settlement, the mediation will conclude and the appeal will go to adjudication. An OHA-provided mediator will not be involved in a subsequent adjudication.

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§ 134.807 SBA response.

(a) If the appeal goes to adjudication, SBA will file and serve the SBA's response to the appeal and any documentation, not already filed by the Employee, that SBA wishes OHA to consider.

(b) Unless the Judge orders a different date (either on his or her own initiative or on motion by a party), the SBA must file any response to the appeal petition no later than 15 calendar days from the conclusion of mediation or 15 calendar days from the filing of the appeal petition, whichever is later.

(c) The SBA's response is normally the last submission in an appeal, although the Judge may order or permit additional submissions. If a party wishes to file an additional submission, the party must file and serve a motion (see § 134.211) accompanied by the proposed submission.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.808 The decision.

(a) The Judge will decide the appeal within 45 calendar days (if practicable) from close of record. The decision will affirm, modify, remand, or reverse the Step One or Step Two decision.

(b) The standard of review and burden of proof will be determined by the specific issue presented.

(c) OHA's decision is an initial decision which becomes the final decision of the SBA 30 calendar days after issuance, unless a party files a request for review pursuant to § 134.809.

(d) OHA's decision is not precedential and it will not be published.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.809 Review of initial decision.

(a) If the Chief Human Capital Officer, General Counsel for SBA, or Counsel to the Inspector General (IG) believes OHA's decision is contrary to law, rule, regulation, or SBA policy, that official may file a Petition for Review (PFR) of the decision with the Deputy Administrator (or IG for disputes by OIG employees) for a final SBA Decision. Only the Chief Human Capital Officer, General Counsel, or

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Counsel to the IG may file a PFR of an OHA decision; the Employee may not.

(b) To file a PFR, the official must request a complete copy of the dispute file from the Assistant Administrator for OHA (AA/OHA) within five calendar days of receiving the decision. The AA/OHA will provide a copy of the dispute file to the official, the Employee, and the Employee's representative within five calendar days of the official's request. The official's PFR is due no later than 15 calendar days from the date the official receives the dispute file. The PFR must specify the objections to OHA's decision.

[82 FR 25507, June 2, 2017]

Subpart I—Rules of Practice for Petitions for Reconsideration of Size Standards

SOURCE: 82 FR 25507, June 2, 2017, unless otherwise noted.

§ 134.901 Scope of the rules in this subpart.

(a) The rules of practice in this subpart apply to Size Standard Petitions.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to Size Standard Petitions listed in paragraph (a) of this section.

§ 134.902 Standing.

(a) A Size Standard Petition may be filed with OHA by any person that is adversely affected by the Administrator's decision to revise, modify, or establish a size standard.

(b) A business entity is not adversely affected unless it conducts business in the industry associated with the size standard that is being challenged and:

(1) The business entity qualified as a small business concern before the size standard was revised or modified; or

(2) The business entity qualifies as a small business under the size standard as revised or modified.

§ 134.903 Commencement of cases.

(a) A Size Standard Petition must be filed at OHA not later than 30 calendar days after the publication in the FEDERAL REGISTER of the final rule that revises, modifies, or establishes the chal-

lenged size standard. An untimely Size Standard Petition will be dismissed.

(b) A Size Standard Petition filed in response to a notice of proposed rulemaking is premature and will be dismissed.

(c) A Size Standard Petition challenging a size standard that has not been revised, modified, or established through publication in the FEDERAL REGISTER will be dismissed.

§ 134.904 Requirements for the Size Standard Petition.

(a) *Form.* There is no required form for a Size Standard Petition. However, it must include the following information:

(1) A copy of the final rule published in the FEDERAL REGISTER to revise, modify, or establish a size standard, or an electronic link to the final rule;

(2) A full and specific statement as to which size standard(s) in the final rule the Petitioner is challenging and why the process that was used to revise, modify, or establish each challenged size standard is alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, together with argument supporting such allegation;

(3) A copy of any comments the Petitioner submitted in response to the proposed notice of rulemaking that pertained to the size standard(s) in question, or a statement that no such comments were submitted; and

(4) The name, mailing address, telephone number, facsimile number, email address, and signature of the Petitioner or its attorney.

(b) *Multiple size standards.* A Petitioner may challenge multiple size standards that were revised, modified, or established in the same final rule in a single Size Standard Petition, provided that the Petitioner demonstrates standing for each of the challenged size standards.

(c) *Format.* The formatting provisions of § 134.203(d) apply to Size Standard Petitions.

(d) *Service.* In addition to filing the Size Standard Petition at OHA, the Petitioner must serve a copy of the Size Standard Petition upon each of the following:

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(1) SBA's Office of Size Standards, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416; facsimile number (202) 205-6390; or sizestandards@sba.gov; and

(2) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416; facsimile number (202) 205-6873; or OPLService@sba.gov.

(e) *Certificate of service.* The Petitioner must attach to the Size Standard Petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.905 Notice and order.

Upon receipt of a Size Standard Petition, OHA will assign the matter to a Judge in accordance with § 134.218. Unless it appears that the Size Standard Petition will be dismissed under § 134.910, the presiding Judge will issue a notice and order initiating the publication required by § 121.102(f) of this chapter; specifying a date for the Office of Size Standards to transmit to OHA a copy of the administrative record supporting the revision, modification, or establishment of the challenged size standard(s); and establishing a date for the close of record. Typically, the administrative record will be due seven calendar days after issuance of the notice and order, and the record will close 45 calendar days from the date of OHA's receipt of the Size Standard Petition.

§ 134.906 Intervention.

In accordance with § 134.210(b), interested persons with a direct stake in the outcome of the case may contact OHA to intervene in the proceeding and obtain a copy of the Size Standard Petition. In the event that the Size Standard Petition contains confidential information and the intervener is not a governmental entity, the Judge may require that the intervener's attorney be admitted to a protective order before obtaining a complete copy of the Size Standard Petition.

§ 134.907 Filing and service.

The provisions of § 134.204 apply to the filing and service of all pleadings and other submissions permitted under

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this subpart unless otherwise indicated in this subpart.

§ 134.908 The administrative record.

The Office of Size Standards will transmit to OHA a copy of the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard by the date specified in the notice and order. The Chief, Office of Size Standards, will certify and authenticate that the administrative record, to the best of his or her knowledge, is complete and correct. The Petitioner and any interveners may, upon request, review the administrative record submitted to OHA. The administrative record will include the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard.

§ 134.909 Standard of review.

The standard of review for deciding a Size Standard Petition is whether the process employed by the Administrator to revise, modify, or establish the size standard was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. OHA will not adjudicate arguments that a different size standard should have been selected. The Petitioner bears the burden of proof.

§ 134.910 Dismissal.

The Judge must dismiss the Size Standard Petition if:

(a) The Size Standard Petition does not, on its face, allege specific facts that if proven to be true, warrant remand of the size standard;

(b) The Petitioner is not adversely affected by the final rule revising, modifying, or establishing a size standard;

(c) The Size Standard Petition is untimely or premature pursuant to § 134.903 or is not otherwise filed in accordance with the requirements in subparts A and B of this part; or

(d) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters.

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Although not required, any intervenor may file and serve a response supporting or opposing the Size Standard Petition at any time prior to the close of record. SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first. The response must present argument.

§ 134.912 Discovery and oral hearings.

Discovery will not be permitted. Oral hearings will not be held unless the Judge determines that the dispute cannot be resolved except by the taking of live testimony and the confrontation of witnesses.

§ 134.913 New evidence.

Disputes under this subpart ordinarily will be decided based on the pleadings and the administrative record. The Judge may admit additional evidence upon a motion establishing good cause.

§ 134.914 The decision.

The Judge will issue his or her decision within 45 calendar days after close of record, as practicable. The Judge's decision is final and will not be reconsidered.

§ 134.915 Remand.

If OHA grants a Size Standard Petition, OHA will remand the matter to the Office of Size Standards for further analysis. Once remanded, OHA no longer has jurisdiction over the matter unless a new Size Standard Petition is filed as a result of a new final rule published in the FEDERAL REGISTER.

§ 134.916 Effects of OHA's decision.

(a) If OHA grants a Size Standard Petition of a modified or revised size standard, SBA will take appropriate action to rescind that size standard and to restore the one that was in effect before the one challenged in the Size Standard Petition. The restored size standard will remain in effect until SBA issues a new size standard. The OHA decision does not affect the validity of a concern's size representation

made under the challenged size standard prior to the effective date of the SBA action rescinding that challenged size standard. Such a concern remains eligible for award as a small business, and the procuring agency may count the award towards its small business goals. If the procuring agency amends the solicitation and requires new self-certifications, those self-certifications will be based on the size standard in effect on the day those self-certifications are made. If the size standard in question was newly established, the challenged size standard remains in effect while SBA conducts its further analysis on remand.

(b) If OHA denies a Size Standard Petition, the size standard remains as published in the Code of Federal Regulations.

§ 134.917 Equal Access to Justice Act.

A prevailing Petitioner is not entitled to recover attorney's fees. Size Standard Petitions are not proceedings that are required to be conducted by an Administrative Law Judge under § 134.603.

§ 134.918 Judicial review.

The publication of a final rule in the FEDERAL REGISTER is considered the final agency action for purposes of seeking judicial review.

Subpart J—Rules of Practice for Protests of Eligibility for Inclusion in the SBA Veteran Small Business Certification Program Database (VOSB or SDVOSB Status Protests)

SOURCE: 87 FR 73425, Nov. 29, 2022, unless otherwise noted.

§ 134.1001 Scope of rules.

(a) The rules of practice in this subpart apply to VOSB or SDVOSB status protests. A VOSB or SDVOSB status protest is the process by which an interested party (see § 134.1002(b)) may challenge a concern's inclusion in the SBA Veteran Small Business Certification Program database or the VOSB or SDVOSB status of an apparent successful offeror on a VOSB or SDVOSB

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contract, including a joint venture submitting an offer under § 128.402 of this chapter. OHA will also consider a protest challenging whether a prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to protests listed in paragraph (a) of this section.

(c) The protest procedures described in this subpart are separate from those governing size protests and size appeals. All protests relating to whether a VOSB or SDVOSB is a "small" business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of a VOSB or SDVOSB and the concern's eligibility for the SBA Veteran Small Business Certification Program, SBA will process each protest concurrently, under the procedures set forth in part 121 of this chapter and this part. SBA does not review issues concerning the administration of a VOSB or SDVOSB contract.

(d) Appeals of denials and cancellations of certification for inclusion in the Veteran Small Business Certification Program are governed by subpart K of this part.

§ 134.1002 Who may file a VOSB or SDVOSB status protest?

(a) For sole source procurements, SBA, VA, or the contracting officer may protest the proposed awardee's VOSB or SDVOSB status.

(b) For all other procurements, any interested party may protest the apparent successful offeror's VOSB or SDVOSB status. An interested party means the contracting officer, SBA, VA, any concern that submits an offer for a specific set-aside VOSB or SDVOSB contract (including Multiple Award Contracts) or order, or any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a reserve of an award given to a VOSB or SDVOSB.

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(c) SBA and VA may file a VOSB or SDVOSB status protest at any time.

EFFECTIVE DATE NOTE: Amendments to § 134.1002 were published at 89 FR 96094, Dec. 4, 2024, effective Jan. 3, 2025.

§ 134.1003 Grounds for filing a VOSB or SDVOSB status protest.

(a) *Veteran status.* In cases where the protest is based on service-connected disability, permanent and severe disability, or veteran status, the Judge will only consider a protest that presents specific allegations supporting the contention that the owner(s) cannot provide documentation from the VA, Department of Defense, or the U.S. National Archives and Records Administration to show that they meet the definition of veteran, service-disabled veteran, or service-disabled veteran with a permanent and severe disability.

(b) *Ownership and control.* In cases where the protest is based on ownership and/or control, the Judge will consider a protest only if the protester presents credible evidence that the concern is not 51% owned and controlled by one or more veterans or service-disabled veterans.

(c) *Ostensible subcontractor.* In cases where the protest is based on an allegation that the prime contractor appears unduly reliant on one or more, non-VOSB or non-SDVOSB subcontractors, or the non-VOSB or non-SDVOSB subcontractor is performing the primary and vital requirements of the contract, OHA will consider a protest only if the protester presents credible evidence of the alleged undue reliance or credible evidence that the primary and vital requirements will be performed by the subcontractor(s).

(d) *Joint ventures.* A VOSB or SDVOSB joint venture may be protested regarding the status of the managing VOSB or SDVOSB joint venture partner or for failure to meet the requirements of § 128.402 of this chapter. If the joint venture is found to be ineligible solely based on failure to meet the requirements of that section, the joint venture will be ineligible for the contract at issue. The finding of ineligibility is limited to that contract and will not affect the underlying eligibility of the VOSB or SDVOSB joint venture partner.

(e) *Date for determining eligibility.* (1) If the VOSB or SDVOSB status protest pertains to a procurement, the Judge will determine a protested concern's eligibility as a VOSB or SDVOSB as of the date of its initial offer or response which includes price. For a protest challenging an ostensible subcontractor or a joint venture's compliance with the joint venture agreement requirements set forth in § 128.402(c), the Judge will determine eligibility as of the date of the final proposal revision for negotiated acquisitions or as of final bid for sealed bidding.

(2) If the VOSB or SDVOSB status protest does not pertain to a procurement, the Judge will determine a protested concern's eligibility as a VOSB or SDVOSB as of the date the VOSB or SDVOSB status protest was filed.

EFFECTIVE DATE NOTE: Amendments to § 134.1003 were published at 89 FR 102510, Dec. 17, 2024, effective Jan. 16, 2025.

§ 134.1004 Commencement of VOSB or SDVOSB status protests.

(a) *Timeliness.* (1) The Secretary of the VA (or designee) or SBA may file a VOSB or SDVOSB status protest at any time.

(2) The contracting officer, SBA, or VA may file a VOSB or SDVOSB status protest at any time after the apparent awardee has been identified or after bid opening, whichever applies.

(3) For negotiated acquisitions, an interested party (see § 134.1002(b)) must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

(i) Except for an order or Blanket Purchase Agreement issued under a Federal Supply Schedule contract, for an order or Agreement that is set-aside for VOSBs or SDVOSBs under a multiple award contract that was not itself set aside or reserved for VOSBs or SDVOSBs, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

(ii) Where a contracting officer has required offerors for a specific order under a multiple award VOSB or SDVOSB contract to recertify their

VOSB or SDVOSB status, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order.

(4) For sealed bid acquisitions, a protest from an interested party (see § 134.1002(b)) must be received by close of business on the fifth business day after bid opening. Where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder must be received prior to the close of business on the 5th business day after the contracting officer has notified interested parties of the identity of that low bidder.

(5) The rule for counting days is in § 134.202(d).

(6) Any protest received after the time limit is untimely, unless it is from SBA, VA, or the contracting officer. An untimely protest will be dismissed.

(b) *Filing.* (1) An interested party, other than SBA, VA, or the contracting officer, must deliver a VOSB or SDVOSB status protest to the contracting officer in person, by email, facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period) to the contracting officer.

(2) VA, SBA, or the contracting officer must submit a VOSB or SDVOSB status protest directly to OHA in accordance with the procedures in § 134.204. The protest should include in the referral letter the information set forth in paragraph (c) of this section.

(3) SBA must submit a VOSB or SDVOSB status protest directly to OHA in accordance with the procedures in § 134.204.

(c) *Referral to OHA.* The contracting officer must forward to OHA any VOSB or SDVOSB status protest received, notwithstanding whether the contracting officer believes it is premature, sufficiently specific, or timely. The contracting officer must send all VOSB or SDVOSB status protests, along with a referral letter, directly to OHA, addressed to Office of Hearings and Appeals, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416, or by email at OHAfilings@sba.gov, marked "Attn:

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VOSB Status Protest" or "Attn: SDVOSB Status Protest". The referral letter must include information pertaining to the solicitation that may be necessary for OHA to determine timeliness and standing, including:

- (1) The solicitation number;
- (2) The name, address, telephone number, and email address of the contracting officer;
- (3) Whether the contract was a sole source or set-aside VOSB or SDVOSB procurement;
- (4) Whether the protester submitted an offer;
- (5) Whether the protested concern was the apparent successful offeror;
- (6) Whether the procurement was conducted using sealed bid or negotiated procedures;
- (7) The bid opening date, if applicable;
- (8) When the protested concern submitted its initial offer which included price;
- (9) When the protest was submitted to the contracting officer;
- (10) When the protester received notification of the apparent successful offeror, if applicable; and
- (11) Whether a contract has been awarded.

§ 134.1005 Contents of the VOSB or SDVOSB status protest.

(a) VOSB and SDVOSB status protests must be in writing. There is no required format for a VOSB or SDVOSB status protest, but it must include the following:

- (1) The solicitation or contract number, if applicable;
- (2) Specific allegations supported by credible evidence that the concern (or joint venture) does not meet the VOSB or SDVOSB eligibility requirements listed in part 128 of this chapter. A protest merely asserting that the protested concern is not an eligible VOSB or SDVOSB, without setting forth specific facts or allegations, is insufficient;
- (3) Any other pertinent information the Judge should consider; and
- (4) The name, address, telephone number, and email address, if available, and signature of the protester or its attorney.

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(b) If the protester intends to seek access to the SBA case file under § 134.205, the protester should include in its protest a request for a protective order. Unless good cause is shown, a protester must request a protective order within five days of filing the protest.

[87 FR 73425, Nov. 29, 2022, as amended at 88 FR 42593, July 3, 2023]

§ 134.1006 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

§ 134.1007 Processing a VOSB or SDVOSB status protest.

(a) *Notice and order.* If the Judge determines that the protest is timely, sufficiently specific, and based upon protestable allegations, the Judge will issue a notice and order, notifying the protester, the protested concern, the Director, Office of Government Contracting (D/GC), SBA Counsel, and, if applicable, the contracting officer of the date OHA received the protest, and order a due date for responses.

(b) *Dismissal of protest.* If the Judge determines that the protest is premature, untimely, nonspecific, or is based on non-protestable allegations, the Judge will dismiss the protest and will send the contracting officer, D/GC, SBA's Associate General Counsel for Procurement Law, and the protester a notice of dismissal, citing the reason(s) for the dismissal. The dismissal is a final agency action.

(c) *Transmission of the case file.* Upon receipt of a notice and order, the D/GC must deliver to OHA the entire case file relating to the protested concern's inclusion in the certification database. The notice and order will establish the timetable for transmitting the case file to OHA. The D/GC must certify and authenticate that the case file, to the best of his/her knowledge, is a true and correct copy of the case file.

(d) *Protective order.* A protester seeking access to the SBA case file must file a timely request for a protective order under § 134.205. Except for good cause shown, a protester must request a protective order within five days of

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filings the protest. Even after issuance of a protective order, OHA will not disclose income tax returns or privileged information.

(e) *Supplemental allegations.* If, after viewing documents in the SBA case file for the first time under a protective order, a protester wishes to supplement its protest with additional argument, the protester may do so. Any such supplement is due at OHA no later than 15 days from the date the protester receives or reviews the SBA case file.

(f) *Response—(1) Timing.* The protested concern, the D/GC, the contracting officer, and any other interested party (see § 134.1002(b)) may respond to the protest and supplemental protest, if one is filed. The response is due no later than 15 days from the date the protest or supplemental protest was filed with OHA. The record closes the date the final response is due.

(2) *Service.* The respondent must serve its response upon the protester or its counsel and upon each of the persons identified in the certificate of service attached to the notice and order or, if a protective order is issued, in accordance with the terms of the protective order.

(3) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

(g) *Basis for decision.* The decision will be based primarily on the case file and information provided by the protester, the protested concern, and any other parties. However, the Judge may investigate issues beyond those raised in the protest and may use other information or make requests for additional information to the protester, the protested concern, or SBA.

(h) *Award of contract.* The contracting officer may award a contract before the Judge issues a decision only if the contracting officer determines that an award must be made to protect the public interest and notifies the Judge and D/GC in writing of such determination. Notwithstanding such a determination, the provisions of paragraph (j) of this section shall apply to the procurement in question.

(i) *Decision.* OHA will serve a copy of the written decision on each party, or, if represented by counsel, on its counsel. The decision is considered the final

agency action, and it becomes effective upon issuance.

(j) *Effect of decision.* (1) A contracting officer may award a contract to a protested concern after the Judge has determined either that the protested concern is eligible for inclusion in SBA's certification database or has dismissed all protests against it.

(2) A contracting officer shall not award a contract to a protested concern that the Judge has determined is not an eligible VOSB or SDVOSB. If the contract has already been awarded, the contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders.

(3) The contracting officer must update the Federal Procurement Data System (or successor system) and other procurement reporting databases to reflect the Judge's decision.

(4) If the Judge finds the protested concern is not an eligible VOSB or SDVOSB, the D/GC must immediately remove the protested concern from the certification database.

(5) A concern found to be ineligible may not submit an offer on a future VOSB or SDVOSB procurement until the protested concern reapplies to the Veteran Small Business Certification Program and has been designated by SBA as a VOSB or SDVOSB into the certification database.

[87 FR 73425, Nov. 29, 2022, as amended at 88 FR 42593, July 3, 2023]

§ 134.1008 Discovery.

Discovery will not be permitted in SBA VOSB or SDVOSB status protest proceedings.

§ 134.1009 Oral hearings.

Oral hearings will be held in VOSB or SDVOSB status protest proceedings only upon a finding by the Judge of extraordinary circumstances. If such an oral hearing is ordered, the proceeding shall be conducted in accordance with those rules of subpart B of this part as the Judge deems appropriate.

§ 134.1010**§ 134.1010 Standard of review and burden of proof.**

The protested concern has the burden of proving its eligibility, by a preponderance of the evidence.

§ 134.1011 Weight of evidence.

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

§ 134.1012 The record.

Where relevant, the provisions of § 134.225 apply. In a protest under this subpart, the contents of the record also include the case file or solicitation submitted to OHA in accordance with § 134.1007.

§ 134.1013 Request for reconsideration.

The decision on a VOSB or SDVOSB status protest may not be appealed. However:

(a) The Judge may reconsider a VOSB or SDVOSB status protest decision. Any party that has appeared in the proceeding, or the SBA, may request reconsideration by filing with OHA and serving a petition for reconsideration on all the parties to the VOSB or SDVOSB status protest within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

(b) If the Judge reverses his or her initial decision on reconsideration, the contracting officer must follow § 134.1007(j) in applying the new decision's results.

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SOURCE: 87 FR 73425, Nov. 29, 2022, unless otherwise noted.

§ 134.1101 Scope of rules.

(a) The rules of practice in this subpart apply to appeals of denial of certification and decertification for inclusion in the SBA Veteran Small Business Certification Program certification database (VOSB or SDVOSB Appeals).

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Protests of a concern's eligibility for inclusion in the SBA Veteran Small Business Certification Program Database (VOSB or SDVOSB Status Protests) are governed by subpart J of this part.

§ 134.1102 Who may file a VOSB or SDVOSB Appeal?

A concern that has been denied certification as a VOSB or SDVOSB or has had its VOSB or SDVOSB status decertified may appeal the decision to OHA.

§ 134.1103 Grounds for filing a VOSB or SDVOSB Appeal.

Denial of certification and decertification of VOSB or SDVOSB status may be appealed to OHA. A denial or decertification based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran or a service-disabled veteran are final VA decisions and not subject to appeal to OHA.

§ 134.1104 Commencement of VOSB or SDVOSB Appeal.

(a) A concern whose application for VOSB or SDVOSB certification has been denied or whose status has been decertified must file its appeal within 10 business days of receipt of the denial or decertification.

(b) The rule for counting days is in § 134.202(d).

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(c) OHA will dismiss an untimely appeal.

EFFECTIVE DATE NOTE: Amendments to § 134.1104 were published at 89 FR 102510, Dec. 17, 2024, effective Jan. 16, 2025.

§ 134.1105 The appeal petition.

(a) *Format.* VOSB or SDVOSB appeals must be in writing. There is no required format for an appeal petition; however, it must include the following:

(1) A copy of the denial or decertification and the date the appellant received it;

(2) A statement of why the denial or decertification is in error;

(3) Any other pertinent information the Judge should consider; and

(4) The name, address, telephone number, and email address, if available, and signature of the appellant or its attorney.

(b) *Service.* The appellant must serve copies of the entire appeal petition upon the Director, Office of Government Contracting (D/GC) and SBA Counsel at *OPLservice@sba.gov*.

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

(d) *Dismissal.* An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge at his/her own initiative or upon motion of a respondent.

§ 134.1106 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

§ 134.1107 Transmission of the case file.

Once a VOSB or SDVOSB appeal is filed, the D/GC must deliver to OHA the entire case file relating to the denial or decertification. The Judge will issue a notice and order establishing the timetable for transmitting the case file to OHA. The D/GC must certify and authenticate that the case file, to the best of his/her knowledge, is a true and correct copy of the case file.

§ 134.1108 Response to an appeal petition.

(a) *Who may respond.* The D/GC (or designee) or counsel for SBA may respond to the VOSB or SDVOSB appeal. The response should present arguments to the issues presented on appeal.

(b) *Time limits.* The notice and order will inform the parties of the filing of the appeal petition, establish the close of record as 15 days after service of the notice and order, and inform the parties that OHA must receive any responses to the appeal petition no later than the close of record.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.1105.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

§ 134.1109 Discovery and oral hearings.

Discovery will not be permitted and oral hearings will not be held.

§ 134.1110 New evidence.

Except for good cause shown, evidence beyond the case file will not be admitted.

§ 134.1111 Standard of review and burden of proof.

The standard of review is whether the D/GC denial or decertification was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

§ 134.1112 The decision.

(a) *Timing.* The Judge shall decide a VOSB or SDVOSB Appeal, insofar as practicable, within 60 calendar days after close of the record.

(b) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered.

(c) *Basis for decision.* Decisions under this subpart will be based primarily on the evidence in the SBA case file, arguments made on appeal, and any response(s) thereto. However, the Judge, in his/her sole discretion, may consider

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issues beyond those raised in the pleadings and the denial or cancellation letter.

(d) *Finality.* The decision is the final agency decision and becomes effective upon issuance. Where OHA dismisses an appeal of a D/GC denial or decertification, the D/GC determination remains in effect.

(e) *Service.* OHA will serve a copy of all written decisions on each party, or, if represented by counsel, on its counsel.

(f) *Effect.* If the Judge grants the appeal and finds the appellant eligible for inclusion in the SBA certification database, the D/GC must immediately include in the SBA certification database.

(g) *Reconsideration.* A decision of the Judge may be reconsidered. Any party that has appeared in the proceeding, or the SBA Administrator or his or her designee, may request reconsideration by filing with OHA and serving a petition for reconsideration on all parties to the VOSB or SDVOSB Appeal within twenty (20) calendar days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

Subpart L—Borrower Appeals of Final SBA Loan Review Decisions

SOURCE: 86 FR 51595, Sept. 16, 2021, unless otherwise noted.

§ 134.1201 Scope of the rules in this subpart.

(a) The rules of practice in this subpart apply to appeals to OHA from certain final SBA loan review decisions under the Paycheck Protection Program (PPP) as described in paragraph (b) of this section, and to any other PPP matter referred to OHA by the Administrator of SBA. The PPP was established as a temporary program under section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116-136), as amended. PPP loans include first draw PPP loans made under Section 7(a)(36) of the Small Business Act and second draw PPP loans made under Section 7(a)(37) of the Small Business Act.

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(b) A final SBA loan review decision that is appealable under this subpart is an official written decision by SBA, after SBA completes a review of a PPP loan, that finds a borrower:

- (1) Was ineligible for a PPP loan;
- (2) Was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses;

(3) Is ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to SBA; and/or

(4) Is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA.

(c) A borrower cannot directly file an appeal of a decision made by a lender concerning a PPP loan with OHA.

(d) An appeal to OHA is an administrative remedy that must be exhausted before judicial review of a final SBA loan review decision may be sought in a Federal district court.

(e) Any determination by SBA's Office of Inspector General concerning a PPP loan is not appealable to OHA.

(f) This subpart does not create any right to appeal any SBA decision on any 7(a) loans (see part 120 of this chapter) other than PPP loans.

(g) The Rules of Practice for Appeals From Size Determinations and NAICS Code Designations in subpart C of this part do not apply to appeals of final SBA loan review decisions or to the PPP.

(h) In addition to the provisions in subpart B of this part specifically referenced in this subpart, the following regulations from subpart B of this part also apply to this subpart: §§134.207 (Amendments and supplemental pleadings); 134.208 (Representation in cases before OHA); 134.209 (Requirement of signature); 134.211 (Motions); 134.212 (Summary judgment); 134.217 (Settlement); 134.218 (Judges); 134.219 (Sanctions); and 134.220 (Prohibition on ex parte communications). Other provisions from subpart B of this part that are not specifically referenced in this subpart do not apply to this subpart.

§ 134.1202 Commencement of appeals of final SBA loan review decisions.

(a) An appeal petition must be filed with OHA within 30 calendar days after

the appellant's receipt of the final SBA loan review decision. To file and manage an appeal of a final SBA loan review decision with OHA, refer to the OHA Case Portal at <https://appeals.sba.gov>. An appellant is required to use the OHA Case Portal to file and manage their appeal.

(b) Appellant must provide their lender with a copy of the timely appeal petition upon filing in order for the lender to extend the deferment period of the PPP loan until a final decision is issued under §134.1211.

(c)(1) Do not count the day the time period begins, but do count the last day of the time period.

(2) If the last day is Saturday, Sunday, or a Federal holiday, the time period ends on the next business day.

Example: On a Thursday, a borrower receives a final SBA loan review decision. The time period begins on Thursday, so the first day to count is Friday. Because the 30th calendar day after receipt of the decision is a Saturday, the appeal deadline extends to the next business day, which is Monday.

(3)(i) A Judge may modify any time period or deadline, except:

(A) The time period governing commencement of a case (*i.e.*, when the appeal petition may be filed); and

(B) A time period established by statute.

(ii) A party may move for an extension of time pursuant to §134.211.

(d) A timely appeal by a PPP borrower of a final SBA loan review decision extends the deferment period of the PPP loan until a final decision is issued under §134.1211.

§ 134.1203 Standing.

Only the borrower on a loan, or its legal successor in interest, for which SBA has issued a final SBA loan review decision that makes a finding in §134.1201(b)(1) through (4) has standing to appeal the final SBA loan review decision to OHA. Lenders and individual owners of a borrower entity do not have standing to appeal a final SBA loan review decision.

§ 134.1204 The appeal petition.

(a) *Content.* The appeal petition must include the following information:

(1) A copy of the final SBA loan review decision that is being appealed and the date it was received by the borrower. A Notice of Paycheck Protection Program Forgiveness Payment does not provide a borrower with a right to appeal to OHA.

(2) A full and specific statement as to why the final SBA loan review decision is alleged to be erroneous, together with all factual information and legal arguments supporting the allegations. There is no required format for an appeal petition. However, the appeal petition must meet the following requirements:

(i) The maximum length of an appeal petition (not including attachments) is 20 pages. A table of authorities is required only for petitions citing more than twenty cases, regulations, or statutes.

(ii) Clearly label any exhibits and attachments.

(3) The name, address, telephone number, email address, and signature of the appellant or its attorney.

(b) *Dismissal.* An appeal petition that does not contain all of the information required by paragraph (a) of this section may be dismissed, with or without prejudice, at the Judge's own initiative, or upon motion of SBA.

(c) *Motion for more definite statement.*

(1) SBA may, no later than five calendar days after receiving a Notice and Order on an appeal petition, move for an order to the appellant to provide a more definite appeal petition or otherwise comply with this section. A Judge may order a more definite appeal petition on his or her own initiative.

(2) A motion for a more definite appeal petition stays SBA's time for filing a response. The Judge will establish the time for filing and serving a response and will extend the close of the record as appropriate.

(3) If the appellant does not comply with the Judge's order to provide a more definite appeal petition or otherwise fails to comply with applicable regulations in this subpart, the Judge may dismiss the petition with prejudice.

§ 134.1205 Dismissal.

(a) The Judge must dismiss the appeal if:

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- (1) The appeal is beyond OHA's jurisdiction as set forth under § 134.1201;
- (2) The appeal is untimely under § 134.1202;
- (3) The appellant lacks standing to appeal under § 134.1203; or
- (4) The appeal is premature because SBA has not yet made a final SBA loan review decision.

(b) The Judge may dismiss the appeal in accordance with § 134.1204(b) or (c)(3), or if the appeal does not, on its face, allege specific facts that if proven to be true, warrant reversal or remand of the final SBA loan review decision.

§ 134.1206 Notice and Order.

Upon receipt of an appeal challenging a final SBA loan review decision, OHA will assign the matter to either an Administrative Law Judge or an Administrative Judge in accordance with § 134.218. Unless the appeal is dismissed under § 134.1205, the Judge will issue a Notice and Order, utilizing the OHA Case Portal, establishing a deadline for production of the administrative record and specifying a date by which SBA may respond to the appeal.

§ 134.1207 The administrative record.

(a) *Time limits.* The administrative record will be due 20 calendar days after issuance of the Notice and Order unless additional time is requested and granted.

(b) *Contents.* The administrative record shall include non-privileged, relevant documents that SBA considered in making its final loan review decision or that were before SBA at the time of the final loan review decision. The administrative record need not, however, contain all documents pertaining to the appellant.

(c) *Non-waiver.* In the event that privileged or confidential information is disclosed in the administrative record, such disclosure shall not operate as a waiver of any claim of privilege or confidentiality by SBA.

(d) *Filing.* SBA will file the administrative record with OHA and serve it on appellant utilizing the OHA Case Portal.

(e) *Objections.* (1) Any objection to the administrative record must be filed with OHA and served on SBA no later than 30 calendar days after the

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issuance of the Notice and Order, utilizing the OHA Case Portal. If additional time to file the administrative record was requested and granted by a Judge, appellant will have 10 calendar days from the date SBA is required to file the administrative record under the judge's order granting an extension in which to file an objection to the administrative record.

(2) The appellant may object to the absence of any document from the administrative record that the appellant believes should have been included in the administrative record.

(3) The Judge will rule upon such objections and may direct or permit that the administrative record be supplemented.

§ 134.1208 Response to an appeal petition.

(a) *Who may respond.* SBA may respond to an appeal as determined in its discretion, but SBA is not required to respond. If SBA elects not to respond, such election shall not be interpreted as an admission or waiver of any allegation of law or fact. In addition, after review of the appeal petition, OHA may request SBA to respond for good cause shown by OHA. Only SBA may respond. If filed, the response should set forth the relevant facts and legal arguments to the issues presented on appeal.

(b) *Time limit.* If an SBA response is filed, it must be filed within 45 calendar days after issuance of the Notice and Order.

(c) *Close of record.* The record will close 45 calendar days from the issuance of the Notice and Order, unless the Judge decides otherwise. Generally, filings after the close of record will not be considered.

(d) *Service.* If a response is filed, the SBA must file its response with OHA, and serve a copy of the response upon the appellant or its attorney, as applicable by utilizing the OHA Case Portal.

(e) *Reply to response.* Generally, a reply to a response is not permitted unless the Judge directs otherwise. See § 134.206(e). However, upon motion (see § 134.211), and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of a supplemental pleading after review of SBA's response and/or

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the administrative record. The proposed supplemental pleading must be filed and served with the motion utilizing the OHA Case Portal.

§ 134.1209 Evidence beyond the record, discovery, and oral hearings.

(a) Generally, the Judge may not admit evidence beyond the administrative record.

(b) Neither discovery nor oral hearings will be permitted in appeals from final SBA loan review decisions.

(c) All appeals under this subpart will be decided solely on a review of the administrative record, the appeal petition, any response, any reply or supplemental pleading, and filings related to objection to the administrative record.

§ 134.1210 Standard of review.

The standard of review is whether the final SBA loan review decision was based on clear error of fact or law. The appellant has the burden of proof.

§ 134.1211 Decision on appeal.

(a) *Time limits and contents.* The Judge will issue his or her decision within 45 calendar days after the close of record, as practicable. The decision will contain findings of fact and conclusions of law, the reasons for such findings and conclusions, and any relief ordered. The decision will be served upon appellant and SBA utilizing the OHA Case Portal.

(b) *Initial decision.* The Judge's decision on the appeal is an initial decision. However, unless a request for reconsideration is filed pursuant to paragraph (c) of this section or the SBA Administrator, solely within the Administrator's discretion, decides to review or reverse the initial decision pursuant to paragraph (d) of this section, an initial decision shall become the final decision of SBA 30 calendar days after its service. The discretionary authority of the Administrator does not create any additional rights of appeal on the part of an appellant not otherwise specified in SBA regulations in this chapter. Any decision pursuant to this subpart applies only to the PPP and does not apply to SBA's 7(a) Loan Program generally or to any interpretation or application of the regulations in part 120 or 121 of this chapter.

(c) *Reconsideration.* An initial decision of the Judge may be reconsidered. If a request for reconsideration is filed and the SBA Administrator does not exercise discretion to review or reverse the initial decision under paragraph (d) of this section, OHA will decide the request for reconsideration and OHA's decision on the request for reconsideration is a reconsidered initial OHA decision.

(1) Either SBA or appellant may request reconsideration by filing with the Judge and serving a petition for reconsideration within 10 calendar days after service of the Judge's decision. The request for reconsideration must clearly show an error of fact or law material to the decision. SBA does not have to have filed a response to the borrower's appeal petition to request reconsideration of the initial decision of the Judge.

(2) The Judge may also reconsider a decision on his or her own initiative within 20 calendar days after service of the Judge's decision.

(3) A reconsidered initial OHA decision becomes the final decision of SBA 30 calendar days after its service unless the SBA Administrator, solely within the Administrator's discretion, decides to review or reverse the reconsidered initial OHA decision under paragraph (d) of this section. The discretionary authority of the Administrator does not create any additional rights of appeal on the part of an appellant not otherwise specified in SBA regulations in this chapter.

(d) *Administrator review.* Within 30 calendar days after the service of an initial OHA decision or a reconsidered initial OHA decision of a Judge, the SBA Administrator, solely within the Administrator's discretion, may elect to review and/or reverse an initial OHA decision or a reconsidered initial OHA decision. In the event that the Administrator elects to review and/or reverse an initial OHA decision and a timely request for reconsideration of a Judge's initial decision is also filed by an appellant pursuant to paragraph (c) of this section, the Administrator will consider such request for reconsideration. The Administrator's decision will become the final decision of the SBA upon issuance.

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(e) *Precedent.* Neither initial nor final decisions rendered by OHA under this subpart are precedential.

(f) *Publication.* Final decisions are normally published without redactions on OHA's website. PPP decisions will likely contain confidential business and financial information and/or personally identifiable information. Therefore, OHA, within its full discretion, may publish final decisions issued under this section with any necessary redactions.

(g) *Appeal to Federal district court.* Final decisions may be appealed to the appropriate Federal district court only.

§ 134.1212 Effects of the decision.

OHA may affirm, reverse, or remand a final SBA loan review decision. If remanded, OHA no longer has jurisdiction over the matter unless a new appeal is filed as a result of a new final SBA loan review decision.

§ 134.1213 Equal Access to Justice Act.

A prevailing appellant is not entitled to recover attorney's fees. Appeals to OHA from final SBA loan review decisions under the PPP are not proceedings that are required to be conducted by an Administrative Law Judge under § 134.603.

§ 134.1214 Confidential information.

If a filing or other submission made pursuant to an appeal in this subpart contains confidential business and financial information; personally identifiable information; source selection sensitive information; income tax returns; documents and information covered under § 120.1060 of this chapter; or any other exempt information, that information is not available to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552.

Subpart M—Rules of Practice for Appeals of Protest Determinations Regarding the Status of a Concern as a Certified HUBZone Small Business Concern

SOURCE: 88 FR 21089, Apr. 10, 2023, unless otherwise noted.

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§ 134.1301 What is the scope of the rules in this subpart?

(a) The rules of practice in this subpart apply to all appeals to OHA from formal protest determinations made by the Director of SBA's Office of HUBZone (D/HUB) in connection with a HUBZone status protest. Appeals under this subpart include any of the grounds for a HUBZone status protest specified in § 126.801 of this chapter, as well as appeals from dismissals of HUBZone status protests by the D/HUB based on a finding that the protest was premature, untimely, nonspecific, not based upon protestable allegations, moot, or not filed by an interested party.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by subpart C of this part.

§ 134.1302 Who may appeal a HUBZone status protest determination?

Appeals from HUBZone status protest determinations may be filed with OHA by the protested concern, the protester, or the contracting officer responsible for the procurement affected by the protest determination.

§ 134.1303 What time limits apply to filing an appeal from a HUBZone status protest determination?

Appeals from a HUBZone status protest determination must be commenced by filing and serving an appeal petition within ten (10) business days after the appellant receives the HUBZone status protest determination (see § 134.204 for filing and service requirements). OHA shall dismiss any untimely appeal.

§ 134.1304 What are the effects of the filing of an appeal on the procurement at issue?

(a) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(b) If a timely appeal is filed before contract award, the contracting officer

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must withhold award until the appellate decision is rendered, unless the contracting officer has determined that award and performance of the contract is in the best interests of the government.

§ 134.1305 What are the requirements for an appeal petition?

(a) *Format.* An appeal from a HUBZone status protest determination must be in writing. There is no required format for an appeal petition. However, it must include the following information:

- (1) A copy of the protest determination;
- (2) The date the appellant received the protest determination;
- (3) A statement that the petitioner is appealing a HUBZone status protest determination issued by the D/HUB;
- (4) A full and specific statement as to why the HUBZone status protest determination is alleged to be based on a clear error of fact or law, together with argument supporting such allegation;
- (5) The solicitation number, the contract number (if applicable), and the name, address, and telephone number of the contracting officer; and
- (6) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* Concurrent with filing the appeal with OHA (*OHAFilings@sba.gov*), the appellant must serve copies of the entire appeal petition upon each of the following:

- (1) The D/HUB at *hzappeals@sba.gov*;
- (2) The contracting officer responsible for the procurement affected by a HUBZone determination;

(3) The protested concern (the business concern whose HUBZone status is at issue) or the protester; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law at *OPLservice@sba.gov*.

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

(d) *Dismissal.* An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge on the Judge's own initiative or upon motion of a respondent.

§ 134.1306 What are the service and filing requirements?

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart, unless otherwise indicated in this subpart.

§ 134.1307 What are the requirements for transmitting the protest file?

Upon receipt of an appeal petition, the D/HUB will send to OHA a copy of the protest file relating to that determination. The D/HUB will certify and authenticate that the protest file, to the best of the D/HUB's knowledge, is a true and correct copy of the protest file.

§ 134.1308 What is the standard of review?

The standard of review for an appeal of a HUBZone status protest determination is whether the D/HUB's determination was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

§ 134.1309 When will a Judge dismiss an appeal?

The presiding Judge must dismiss the appeal if:

- (a) The appeal is untimely filed under § 134.1303;
- (b) The appeal does not, on its face, allege facts that if proven to be true, warrant reversal or modification of the determination; or
- (c) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters; however, once an appeal has been filed, initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

§ 134.1310 Who can file a response to an appeal petition and when must such a response be filed?

(a) *Who may respond.* Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. The response should present arguments related to the issues presented on appeal.

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(b) *Time limits.* If a person decides to file a response, the response must be filed within fifteen (15) business days after service of the appeal petition.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.1305.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

§ 134.1311 Will the Judge permit discovery and oral hearings?

Discovery will not be permitted, and oral hearings will not be held.

§ 134.1312 What are the limitations on the introduction of new evidence?

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto.

§ 134.1313 When is the record closed?

The record will close when the time to file a response to an appeal petition expires pursuant to § 134.1310.

§ 134.1314 When must the Judge issue the decision?

The Judge shall issue a decision, insofar as practicable, within forty-five (45) calendar days after close of the record.

§ 134.1315 What are the effects of the Judge's decision on the procurement at issue?

The Judge's decision is the final agency decision and becomes effective upon issuance. For the effects of the decision on the procurement at issue, see § 126.803(e) of this chapter.

§ 134.1316 Can a Judge reconsider an appeal decision?

(a) Any party who has appeared in the proceeding, or SBA, may request reconsideration of the OHA appeal decision by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within

twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on the Judge's own initiative, within twenty (20) calendar days after issuance of the written decision.

(b) The Judge may remand a proceeding to the D/HUB for a new HUBZone status protest determination if the D/HUB fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new HUBZone status protest determination.

PART 136—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE SMALL BUSINESS ADMINISTRATION**Sec.**

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- 136.102 Application.
- 136.103 Definitions.
- 136.104-136.109 [Reserved]
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- 136.152-136.159 [Reserved]
- 136.160 Communications.
- 136.161-136.169 [Reserved]
- 136.170 Compliance procedures.

AUTHORITY: 29 U.S.C. 794.

SOURCE: 53 FR 19760, May 31, 1988, unless otherwise noted.

§ 136.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation,