Proposed Rules

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

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, and 134

RIN 3245–AE92

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

AGENCY: Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The Small Business Administration (SBA) proposes to amend its regulations governing proceedings before the Office of Hearings and Appeals (OHA). The regulation's last comprehensive revisions were in 1996, followed by additional revisions in 1998 and 2000. The SBA also proposes to make conforming changes to several sections of the regulations governing the Small Business Size Determination program and the 8(a) Business Development (8(a) BD) program.

The major goals of this proposed rule are to: Improve the appeals process by revising and clarifying procedures, particularly those on filing, service, and calculating deadlines that have proven to be ''stumbling blocks'' causing additional litigation and delays; expedite certain procedures; conform the regulations governing proceedings before OHA to other regulations and procedures developed by case law and prevailing practice; and make plain language revisions.

DATES: Comments must be received on or before April 11, 2002.

ADDRESSES: Address your comments to Gloria E. Blazsik, Acting Assistant Administrator for Hearings and Appeals, 409 Third Street, SW, Suite 5900, Washington, DC 20416 and electronic comments to *OHA@sba.gov.*

Electronic Access and Filing

You may submit comments and data by sending electronic mail (e-mail) to: *OHA@sba.gov.* Submit comments as Microsoft Word 97 or as ASCII files avoiding the use of special characters and any form of encryption. Identify all comments and data in electronic form with the title, ''Comment on Proposed Rules—Part 134.'' You may file electronic comments on this proposed rule online at many Federal Depository Libraries.

Public Review of Comments

Whether you comment on paper or electronically, your comments, including name, street address, or other contact information (such as e-mail address, facsimile, or phone number), will be available for public review at this address during regular business hours (8 a.m. to 5 p.m.), Monday through Friday, except federal holidays. You may request confidentiality. If you want us to consider withholding your contact information from public review or from disclosure under the Freedom of Information Act, 5 U.S.C. 552, you must state this request at the beginning of your comment. We will honor requests for confidentiality, to the extent the law allows, on a case-by-case basis. If you are an organization or business, or identify yourself as a representative or official of an organization or business, we will make your entire submission available for public inspection.

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

SUPPLEMENTARY INFORMATION: The SBA proposes to revise part 134, the rules of procedure governing cases before the Office of Hearings and Appeals. The SBA last comprehensively revised the regulations in 1996, then made additional revisions in 1998 and 2000. *See* 61 FR 2682 (January 29, 1996), 63 FR 35726 (June 30, 1998), 65 FR 57541 (September 25, 2000). These proposed revisions would improve and clarify various procedures to make the OHA appeals process more efficient and more understandable to non-lawyers. The SBA also proposes to revise those sections of part 121, the Small Business Size Regulations, and part 124, the 8(a) Business Development program, relating to OHA appeals.

Highlights of this Proposed Rule

As discussed in detail in the Section-by-Section Analysis, the proposed rule would make the following major revisions to OHA's procedures:

- establish the start date for the period for appealing an SBA determination to OHA as when the petitioner receives the SBA determination, rather than when the SBA serves it (134.202(a));
- establish the date of filing as when OHA receives the submission, if no later than 5:00 p.m. eastern time (§ 134.204(b));
- establish the date of service as when the submission is faxed, mailed, personally delivered to the party served, or given over to a delivery service (§ 134.204(c));
- establish that, when a party appeals an SBA determination, the SBA's burden is reduced to a mere response rather than an answer (§ 134.206), and change other sections (specifically, §§ 134.101, 134.205(b), 134.206 heading, 134.207(d), redesignated 134.211(e), and 134.406(d)) to conform to this new distinction;
- establish the start date for the period for filing the answer or response as when an appeal petition is filed, rather than the day it is served on the respondent (§ 134.206(a), (b));
- delete the provision denying an absolute right to appeal a size determination (§ 134.303);
- establish the start date for the 15-day or 30-day time period for filing a size appeal as when the appellant receives the size determination, rather than when the SBA serves it (§ 134.304(a)); and
- permit reconsideration of an initial or final decision of the Judge, on certain grounds, unless a statute or regulation otherwise prohibits it (§ 134.227(c)).

To clarify and simplify OHA's procedures, the proposed rule would:

- reorganize and thoroughly revise the provisions on filing, service, and the certificate of service for simplicity and clarity (§§ 134.204 and 134.304);
- reduce the number of rules governing the date of filing from three to one (§ 134.204(b));

To expedite and streamline OHA procedures, the part 134 proposed rule would:

• reduce from 20 to 15 days the time for respondent to file a motion for a more definite statement (§ 134.205(a));

• require a party moving to amend or supplement its pleadings to file and serve its proposed amendment or supplemental pleading with its motion (§ 134.207);

• permit intervention by the SBA only until 15 days after the close of record and intervention by other persons only until the close of record, rather than until final decision (§ 134.210);

• require a party filing a routine motion to obtain and to state the other parties' positions on the motion (§ 134.211(b));

• require that the answer or response be filed within 20 days of an order denying a motion to dismiss (§ 134.211(d));

• require a party seeking an extension of time to file its motion at least two days before the original deadline, except for good cause shown (§ 134.211(f));

• eliminate the need to file a settlement agreement if the parties file a joint motion to dismiss, unless the Judge has express authority under statute, regulation, or SOP to review the settlement agreement for legality and orders the agreement to be filed (§ 134.217); and

• require, in size and NAICS code appeals, that a party moving to submit new evidence file and serve its proposed new evidence with its motion (§ 134.308(a)(2)).

To conform part 134 to other SBA regulations, OHA case law, or prevailing practices, the proposed rule would:

• amend the list of cases over which OHA has jurisdiction to include appeals of certain Small Disadvantaged Business determinations, certain decisions relating to Women's Business Centers and Small Business Development Centers, certain matters involving debarments and suspensions, and decisions of the Appropriate Management Official in SBA Employee Dispute Resolution Process cases (134.102);

• clarify, when there is incomplete service or an amended appeal petition, that the Judge, by order, will set the deadline for the response or answer (134.206(c));

• clarify, in a competitive 8(a) BD contract, that an adversely affected entity may appeal a NAICS code (§ 134.302(b));

• clarify that OHA does not issue advisory opinions (§ 134.303);

• clarify that the 10-day time period for filing a NAICS code appeal begins anew whenever the contracting officer issues an amendment affecting the NAICS code (134.304(a)(3)); and

• clarify that certain 8(a) BD appeal regulations (§§ 134.402, 134.406(a), (b), and 134.407(a)) do not apply to 8(a) BD suspension appeals, to conform with § 124.305 and OHA's case law, such as *Matter of All American Meats, Inc.*, SBA No. BDP–107 (1998).

These proposed revisions are discussed in more detail in the Section-by-Section Analysis.

On May 15, 2000 (65 FR 30836), the SBA replaced the Standard Industrial Classification (SIC) system with the North American Industry Classification System (NAICS) as the basis for the SBA's small business size standards.

This proposed rule would revise 13 CFR part 134 to conform it to the NAICS and part 121 by adding the definition for NAICS code to § 134.101 and by replacing the acronym ''SIC,'' wherever it appears in part 134, with the acronym ''NAICS.'' The sections affected are: § 134.102(k); redesignated § 134.201(a); Subpart C heading; § 134.301; § 134.302 (introductory text), (b); § 134.304(a) (introductory text), (a)(3); § 134.305(a)(1), (a)(3), (c); redesignated § 134.306(b); § 134.310; § 134.311; and § 134.314.

Plain Language Revisions

To further enhance readability of these regulations, the SBA proposes to make several ''plain language'' revisions. These include providing a simple fill-in-the-blanks sample format for certificates of service (§ 134.204(d)). SBA also has broken down some sections into designated paragraphs and reorganized or reworded others to aid public understanding.

Section-by-Section Analysis

The following is a section-by-section analysis of each provision of SBA's regulations that would be affected by this proposed rule, other than the nomenclature change of SIC to NAICS, changes conforming to redesignated § 134.206(b), and non-substantive improvements of language. OHA's current regulations and much of its case law are available on the Internet at *www.sba.gov/oha.*

Part 121

Section 121.1009(h), on reopening size determinations, would be amended to conform to the revision, in proposed § 121.1101, making appeal to OHA a matter of right, rather than a matter of OHA's discretion.

Section 121.1101, on appeals of size determinations, would be amended to delete the provision that denies an absolute right to an OHA appeal from a size determination. Current § 121.1101, issued in 1996, makes an appeal of a size determination a matter of OHA's discretion, rather than an absolute right of a party adversely affected by a size determination. This provision has caused confusion on the issue of the exhaustion of administrative remedies, and so SBA proposes to revert to the pre-1996 rule. The proposed rule also would clarify, in the case of size determinations, that administrative remedies include an OHA appeal, and that judicial review may not be sought until after the OHA appeal has been exhausted.

Section 121.1102, on appeals of NAICS code designations, also would be amended to include the clarifying language on administrative remedies.

Part 124

Sections 124.206(c), 124.304(b), 124.304(e), 134.305(c), and 124.515(i) contain the time periods (deadlines) for filing 8(a) appeals with OHA. Currently, these time periods begin when the SBA ''serves'' the determination being appealed. These service-based rules have caused much confusion and uncertainty in calculating the deadline for filing an 8(a) appeal, and no small amount of additional litigation to determine the date the determination has been ''served.'' The proposed rule would replace the service-based rules with receipt-based rules, so that all time periods for filing 8(a) appeals would begin when the 8(a) applicant or participant receives the determination being appealed.

Part 134, Subpart A

Section 134.101, definitions, would be amended to add definitions for ''appeal petition'' and ''NAICS code''; to delete the definition for ''SIC code''; and to revise the existing definitions for ''party,'' ''petition,'' and ''pleadings.'' Additionally, the amendments would clarify that the procuring activity contracting officer (CO) who issued a solicitation is a party to any appeal of the NAICS code; therefore, the OHA Judge may order the CO to file a response.

Section 134.102, on jurisdiction, lists the types of cases in which OHA has authority to conduct proceedings, but omits some appeals mandated elsewhere. The proposed rule would add cases involving: (1) Certain Small Disadvantaged Business (SDB) certification and decertification determinations (subpart B of part 124); (2) certain decisions relating to Women's Business Centers and Small Business Development Centers (sections 21(1) and 29(h) of the Small Business

Act, 15 U.S.C. 648(1) and 656(i)); (3) certain matters involving debarments and suspensions (part 145); and (4) in SBA Employee Dispute Resolution Process (Employee Dispute) cases, the decision of the Appropriate Management Official (SBA's Standard Operating Procedure (SOP) 37 71 02). The proposed rule also would conform existing § 134.102(d) with part 120, which grants OHA appeal rights not only to lenders, but also to other entities, such as pool assemblers, subject to SBA enforcement actions related to SBA loan programs.

The proposed rule would delete the last sentence of current § 134.103(b), to conform that regulation to proposed new § 134.211(f), regarding motions to extend time.

Part 134, Subpart B

Section 134.202, commencement of cases, contains the deadlines for commencing OHA litigation. The proposed rule would reorganize this section by listing separately cases that a party other than the SBA may commence by filing an appeal petition (§ 134.202(a)) and cases that the SBA may commence by issuing an order to show cause (§ 134.202(b), (c)).

Proposed § 134.202(a)(1) would set time limits for all cases commenced by appeal petition, except for debt collection cases, applications for fee awards, 8(a) program suspension cases, and SBA Employee Dispute cases, which would be contained in § 134.202(a)(2)–(a)(5), and for size and NAICS code appeals, which are contained in subpart C. Currently, the time for filing an appeal petition begins when the SBA ''serves'' the determination being appealed (service-based rule), except in debt collection cases, in which time starts when the petitioner receives the SBA's notice (receipt-based rule), and in size appeals, in which OHA has used a receipt-based rule since 1984.

The service-based rule for determining the deadline for filing an appeal petition has caused unnecessary confusion and litigation. On the contrary, the receipt-based rule has had a long, successful track record. After careful consideration of both methods, SBA concludes the receipt-based rule is better and should extend to all appeals commenced by appeal petition.

Proposed new § 134.202(a)(5) would refer to SOP 37 71 02 (available at *www.sba.gov/library/soproom.html*), which contains special procedures, including deadlines, governing Employee Dispute cases.

Section 134.203, the petition, lists the general requirements for all appeal petitions. The proposed rule additionally would require the petitioner to provide its facsimile number, to facilitate service by facsimile; and to state when it received the determination being appealed, to help OHA determine timeliness.

Proposed § 134.203(a)(2) would clarify that an appeal petition must include a copy of the SBA determination. Proposed new § 134.203(a)(6) would clarify that an appeal petition must include a certificate of service. Proposed new § 134.203(a)(7) would require the petitioner in debt cases to state when it received the notice initiating the debt collection proceeding. Finally, proposed § 134.203(b) would reference other requirements relating to particular types of appeal petitions located elsewhere in part 134 or in the applicable SBA program regulations.

Section 134.204 contains the filing and service requirements for all pleadings and other submissions to OHA. The current rule has proven very confusing to litigants. Accordingly, the SBA proposes to reorganize the rule and to simplify certain procedures.

Proposed § 134.204(a) would state the acceptable methods of filing and service, with the proviso that the Judge may, for good cause, order filing or service by a particular method. These methods are first-class mail (including certified and registered mail), express mail, and priority mail; hand delivery; and facsimile. The generic term ''delivery'' would include forms of non-mail delivery, such as: personal delivery by the person certifying service; or delivery by a messenger, courier service, or other commercial delivery service, such as United Parcel Service, Federal Express, or Airborne. Delivery does not include electronic mail.

Proposed § 134.204(b) and (b)(1), on filing, would define filing as receipt of pleadings and other submissions at OHA; establish the filing date as when OHA receives a submission, provided OHA receives it on or before 5:00 p.m. eastern time; and give OHA's suite, telephone, and facsimile numbers.

Proposed § 134.204(b)(2) would reduce from three to one the number of rules for determining the date an OHA submission is filed. Current § 134.204(e) specifies the date of filing as the date of transmission if filed by facsimile; the date of postmark if filed by first-class mail; and the date of OHA's receipt if filed by express mail, personal delivery, or commercial delivery. Current § 134.204(b)(2) requires filings by personal or commercial delivery to be made between 8:30 a.m. and 5:00 p.m. without reference to time zone.

The proposed rule would set the filing date as when OHA receives a submission, regardless of the method used, if OHA receives it on or before 5:00 p.m. eastern time. Thus, proposed § 134.204(b)(1) would change the current rules in two ways: (1) For filings by first-class mail, change the filing date from the postmark date to the receipt date; and (2) for filings by facsimile received at OHA after 5:00 p.m., change the filing date from that day to the next.

Proposed § 134.204(b)(3) would explain better the requirement, in current § 134.204(c), to authenticate exhibits. Proposed § 134.204(b)(4) would state when the Judge would not accept a copy of an exhibit instead of the original.

Proposed § 134.204(c), service (current § 134.204(a), (e)), would define service; state the service requirement; state the rules for determining the service date; and, regarding the address for serving the SBA, refer to other subparts of part 134 or to other SBA regulations that might apply to particular types of appeals.

As with the filing date, the current rules set the service date as the transmission date for service by facsimile; the postmark date for service by first-class mail; and the receipt date for service by express mail, personal delivery, or commercial delivery.

Proposed § 134.204(c)(2) would set the service date of a document as follows: for service by facsimile, when sent; for personal delivery by the person certifying service, when given to the party served; for commercial delivery, when given to the delivery service; and for service by mail, when mailed (postmarked). The proposed rule would treat all forms of mail consistently and retain the current rule's rebuttable presumption that a piece was mailed (and thus served) five days before its receipt, absent a postmark or other evidence of mailing date.

Thus, proposed § 134.204(c) would alter the current rules in two ways: (1) for service by Express Mail, change the service date from receipt date to postmark date; and (2) for service by commercial delivery service, change the service date from receipt date to the date the document is given to the delivery service.

Proposed § 134.204(d), certificate of service, would give greater detail and include a fill-in-the-blanks format.

Current § 134.204(e), on filing and service dates, would be eliminated as obsolete.

Current § 134.204(f), confidential information, would be redesignated as paragraph (e).

Proposed § 134.205(a), motion for a more definite statement, would reduce the respondent's time period for filing this motion from 20 to 15 days, the same time period that existed before March 1, 1996. *See* 13 CFR 134.11(c) (1995). This revision would help all parties to clarify and join the issues in an appeal at the earliest possible time.

Proposed § 134.206, the answer, would be revised to include two separate procedures. If the case involves an appeal from an SBA determination, the respondent's pleading would be called the response, and proposed § 134.206(b), (c), and (d) would apply. In all other cases (including debt collection cases and cases commenced by an order to show cause), the respondent's pleading would continue to be called the answer, and proposed § 134.206(a), (c), and (d) would apply. Proposed § 134.206(a) would refer to SOP 37 71 02 (available at *www.sba.gov/library/soproom.html*) for the deadlines that apply to Employee Dispute cases.

Proposed § 134.206(a), on the answer, would be revised to include the substance of current § 134.206(a), (b), and (c); however, the time period (deadline) for filing the answer would run from the day the appeal petition is filed, rather than the day it is served on the respondent. In cases commenced by an order to show cause, the time period for filing the answer would continue to run from the time SBA served the order to show cause.

Proposed § 134.206(b), on the response, would conform to current practice by requiring OHA to inform all known parties of the date an appeal petition was filed. The deadline for and content of the response would be the same as for the answer, except that the respondent would not need to respond to the factual allegations in the petition and would not admit any allegation by failing to deny it, but must set forth the respondent's positions in support of the SBA determination.

Proposed § 134.206(c) would provide, in the event of incomplete service or an amended order to show cause or appeal petition, for the Judge to order the deadline for filing the answer or the response. In the case of incomplete service, that deadline would not be less than 45 days after petitioner serves respondent. This provision would conform this section to OHA's current practice under § 134.103(b).

Current § 134.206(d) and (e) would be combined into proposed § 134.206(d), and rewritten more concisely. The scope of the provision for the filing of the administrative record upon a default, which currently applies only to 8(a) cases, would be expanded to include any case in which the SBA is required to file an administrative record.

Current § 134.207, amendments and supplemental pleadings, would be revised, in § 134.207(a) and (b), to include the additional requirement that a party moving to amend or supplement its pleadings must file and serve its proposed amendment or supplemental pleading along with its motion. The proposed rule would conform these procedures to prevailing practices.

Proposed § 134.208, on representation before OHA, would be revised, in § 134.208(a), to clarify that an officer of any type of entity except a partnership may represent that party.

Proposed § 134.210, intervention, would be revised to limit the time in which additional parties may intervene. Current § 134.210(a), on intervention by the SBA, and current § 134.210(b), on intervention by interested parties, permit intervention at any time until the Judge issues a final decision. The proposed rule would permit intervention by the SBA only until 15 days after close of record or until the issuance of a decision, whichever comes first, and intervention by other parties only until the close of record. Because intervention can change the entire course of a case, the public interest in conservation of judicial resources and efficient, speedy resolution of the issues mandates aligning the parties in a case earlier, rather than later.

Proposed § 134.210(b) also would limit the definition of ''interested person'' to include only those individuals, business entities, or government agencies that have a direct stake in the outcome of the appeal. Thus, this proposed rule would permit only a small group of persons to intervene, in contrast to proposed § 134.309(a), which would permit any person with a ''general interest'' in an issue raised by the appeal to respond to the appeal. Proposed § 134.210(b) also would clarify that the Judge may grant leave to intervene upon such terms as he or she deems appropriate.

Current § 134.211, motions, would be revised substantively in three places. Proposed § 134.211(b) would require the moving party, in most motions, to obtain and to state, in the motion itself, the other parties' positions on the motion. This change would eliminate ex parte telephone calls by OHA staff to ascertain the parties' positions and, for unopposed motions, the need to wait out the 20-day response period.

Current § 134.211(d), now entitled ''Stay,'' would be renamed ''Motion to dismiss.'' It would explicitly allow filing of a motion to dismiss any time before the decision is issued. It also would require that the answer or response, if not already filed, be filed within 20 days after an order denying the motion.

Proposed new § 134.211(f) would establish a special procedure for motions to extend time. It would require the party seeking to extend a filing deadline to file its motion at least two days before the original deadline. This proposed rule would prevent the awkward situation in which a motion to extend time is filed just before the original deadline, and the Judge is unable to rule on it until the next day, rendering the moving party in technical default. The proposed rule also would provide for a good-cause exception to the two-day time period.

Proposed § 134.212, summary decision, would include a new paragraph (e) clarifying, in a case involving an appeal petition from a non-8(a) SBA determination based on two or more grounds, that the SBA could move for a summary decision dismissing the appeal based on one or more grounds. If the Judge finds, as to any such ground, no genuine issue of material fact and that the SBA is entitled to judgment as a matter of law, the Judge would grant the motion and dismiss the appeal.

Proposed § 134.214, on subpoenas, would clarify that subpoenas are not authorized for proceedings relating to internal Agency determinations, such as Employee Disputes.

Current § 134.217, settlement, would be revised to simplify the settlement procedure. In contrast to the current requirement to submit the entire settlement agreement, the proposed rule would require only the filing of a joint motion to dismiss the appeal; however, when statute, SBA regulation, or SBA SOP expressly authorizes the Judge to review a settlement agreement for legality, the Judge may order the settlement agreement to be submitted.

Current § 134.226, the decision, specifies a deadline for rendering a decision only for debt cases. The proposed rule would add a sentence clarifying that applicable SBA program regulations or other subparts of part 134 might contain time limits for rendering decisions in other types of cases.

Current § 134.227, finality of decisions, would be reorganized with a new provision authorizing reconsideration of an initial or final decision of the Judge. Proposed § 134.227(a), initial decisions (current § 134.227(b)), would restate the general rule that, unless otherwise provided in part 134, all OHA decisions are initial decisions. Further, all initial decisions become final decisions 30 days later,

absent either a request for review under § 134.228(a) or a request for reconsideration under § 134.227(c).

Proposed § 134.227(b), final decisions (current § 134.227(a)), would list the types of appeal proceedings in which OHA's decision on the merits is SBA's final decision upon issuance. The list would include debt cases, 8(a) BD program appeals, size appeals, NAICS code appeals, and any other proceeding for which either the applicable program regulations or another subpart of part 134 provides for a final decision.

Proposed § 134.227(c), reconsideration, would be new. It would state a general rule that any initial or final decision of the Judge may be reconsidered unless a statute, the applicable program regulations, or part 134 specifically prohibits reconsideration. The proposed rule also would specify that a request for reconsideration must be filed with the Judge within 20 days after service of the decision, and must demonstrate a clear showing of an error of fact or law material to the decision. The proposed rule also would permit an OHA Judge to reconsider a decision of a Judge on his or her own initiative. This proposed rule would restore the Judge's authority, which existed between 1990 and 1996 in size cases, to reconsider a decision of a Judge to correct a clear error. *See* 13 CFR 121.1721 (1995).

Current § 134.228(a) would be amended to clarify that a party could seek review by the Administrator of a Judge's initial decision, whether or not the decision had been reconsidered.

Current § 134.229, termination of jurisdiction, would be revised to state that, except where a case is being reconsidered or has been remanded, OHA's jurisdiction terminates on issuance of a decision resolving all material issues. This revision would conform this regulation to proposed new § 134.227(c).

Part 134, Subpart C

Current § 134.302, who may appeal, would be revised to permit an entity that is adversely affected by the NAICS code in a competitive 8(a) BD contract to appeal that NAICS code. This proposed rule would conform this section to the 1998 revision to § 121.1103(a), which permits only the Associate Administrator for 8(a) Business Development (AA/8(a)BD) to appeal the NAICS code for an 8(a) sole source contract. *See* 63 FR 35739.

Current § 134.303, no absolute right to an appeal from a size determination, would be deleted to conform to proposed § 121.1101. In its place, proposed new § 134.303, advisory opinions, would clarify that OHA does not issue advisory opinions, including decisions on issues that are or have become moot. This proposed rule would codify long-standing OHA case law, including *Size Appeal of Lightcom International, Inc.*, SBA No. SIZ–4118 (1995).

Current § 134.304, on commencement of size and NAICS code appeals, sets the time period for filing size and NAICS code appeals. Section 134.304(a)(1), the ''15-day rule,'' applies to appeals of size determinations in pending procurements or sales. Section 134.304(a)(2), the ''30-day rule,'' applies to appeals of size determinations where there is no pending procurement or sale. The current rules, in effect since April 1, 1996 (61 FR 2687), begin both time periods when the SBA served its size determination. The prior rules, in effect 1984–1996, began both time periods when the appellant received the size determination. *See* 13 CFR 121.1705(a)(1), (a)(2) (1995).

The proposed rules would restore the prior method of determining when the time periods for filing size appeal petitions begin. Thus, the 15-day or 30-day time period would begin on the appellant's receipt, rather than SBA's service, of the size determination.

Under the prior, receipt-based rules, OHA determined when the filing time period began (and thus whether an appeal was timely) using the return receipt card (Postal Service Form 3811) contained in the Area Office file. Under the current, service-based rules, OHA needs the postmark on the mailing envelope as evidence of the date of service. The mailing envelope, however, is not in the Area Office file; it either has been destroyed or is in the appellant's hands. Thus, OHA cannot determine when the filing time period began and, thus, whether a size appeal is timely, without first requiring proof of timeliness and then adjudicating that issue. These additional steps cause delays. To avoid this problem, OHA Judges consistently have used the prior, receipt-based method as a ''rule of convenience.'' *See Size Appeal of Prose, Inc.*, SBA No. SIZ–4196 (1996); *Size Appeal of DTH Management JV*, SBA No. SIZ–4376 (1999). The proposed rule would conform the regulation to this long-standing practice.

Current § 134.304(a)(3), on NAICS code appeals, would be revised to clarify that the 10-day time period for filing an appeal begins anew whenever the procuring activity contracting officer issues an amendment affecting the NAICS code. This revision would conform the regulation to OHA's long-standing case law. *See SIC Appeal of Madison Services, Inc.*, SBA No. SIC–4223 (1996).

Current § 134.305, the appeal petition, lists the requirements for appeal petitions in size and NAICS code appeals. Proposed § 134.305(a)(4) would also require the appellant's facsimile number, thus facilitating service by facsimile. Proposed § 134.305(d), on certificate of service, would contain a reference to § 134.204(d), which describes the general requirements for certificates of service.

Proposed § 134.306, transmission of the case file and solicitation, would clarify that in both size and NAICS code appeals, the procuring activity contracting officer must send OHA a paper copy of the original solicitation and all amendments. This proposed rule would ensure that OHA receives the complete solicitation and eliminate the problem of incompatible electronic formats.

Current § 134.308, on new evidence, would be revised to include the additional requirement that a party moving to submit new evidence in an appeal must file and serve its proposed new evidence along with its motion. The proposed rule would conform the regulation to prevailing practices.

Section 134.309, response to an appeal petition, would be revised to broaden the category of persons who may respond to an appeal and to conform the time limits for responses to long-standing OHA practices. Current § 134.309(a) permits only ''interested persons,'' that is, those who are or could be parties, to file a response to an appeal. Proposed § 134.309(a) would permit, besides ''interested persons,'' any person who has a ''general interest'' in an appeal to file a response. Thus, this revision would remove the regulatory barrier to responses from such persons; however, the Judge would have to determine whether a particular response is relevant before admitting it into the record.

Current § 134.309(b) permits a respondent to file a response within 10 days after service of the appeal petition, unless the Judge otherwise specifies. Consistent with OHA's long-standing practices, the proposed rule would require OHA to issue a Notice and Order informing the parties when OHA received the appeal, setting the close of record as 15 days after service of the Notice and Order, and requiring any responses to the appeal to be received at OHA no later than the close of record.

Current § 134.313, applicability of subpart B provisions, would be revised to state, simply, that the provisions of subpart B, OHA's general rules of practice, apply to size and NAICS code

appeals, except where inconsistent. Current § 134.313 lists specific sections of subpart B; however, practice has shown this list to be incomplete and confusing. The Judge should be able to determine when a particular subpart B provision conflicts with the subpart C regulations governing size or NAICS code appeals.

Section 134.316, the decision, would be revised to clarify that the Area Office's size determination remains in effect if OHA dismisses the appeal from it. The proposed rule would clarify that the decision in a NAICS code appeal may not be reconsidered.

Current § 134.317, termination of jurisdiction, would be deleted as unnecessary and current § 134.318, return of the case file, would be redesignated as § 134.317.

Part 134, Subpart D

Current § 134.402, appeal petition, conflicts with § 124.305(d), which places the burden in suspension appeals on the SBA, not the petitioner. Revised § 134.402 would clarify that it does not apply to suspension appeals.

Current § 134.403, on service, would be revised to delete § 134.403(a)(3), which is unnecessary.

Current § 134.406(a) limits review to the written administrative record, but § 124.305(c) contemplates a hearing in a suspension appeal. Current § 134.406(b) limits review to the issue of whether the SBA's determination is arbitrary, capricious, or contrary to law, but § 124.305(d) establishes the issue in suspension appeals as whether the SBA has produced adequate evidence to show that suspension is necessary to protect the Government's interest. Revised § 134.406(a) and (b) would clarify that they do not apply to suspension appeals. Proposed § 134.406(c) would specify that the administrative record also must include documents relied upon by SBA officials who made recommendations regarding the SBA determination and clarify that the administrative record submitted by SBA would be deemed complete unless the petitioner objects to its completeness or the Judge finds the record insufficiently complete, under § 134.406(e), to permit a decision on the merits. Current § 134.406(e) permits the Judge to order a remand to the SBA if, due to the absence of the reasons upon which the SBA determination was based, the administrative record is insufficiently complete to decide whether the SBA determination is arbitrary, capricious, or contrary to law. Then the SBA responds to the order, and the Judge decides the case. Proposed § 134.406(e) would state that the SBA, when responding to the remand order, need not supplement the administrative record except to supply any reasons for the determination or any documents it received or considered in connection with any reconsideration during the remand period. If, however, the Judge found, from the SBA's response to the remand order, that the supplemented record still did not contain the reasons upon which the determination was based, the Judge could not require the SBA to further supplement the administrative record and thus provide the SBA another opportunity to provide the reasons upon which the determination was based, but must find the SBA determination arbitrary, capricious, or contrary to law. However, nothing in the rules prevents the SBA from filing, or the Judge from granting, a meritorious motion to dismiss on other grounds. Finally, proposed § 134.406(e) would permit the Judge to set a reasonable period for remand, because the current period of 10 working days has proven to be unreasonable.

Current § 134.407(a) limits the admission of evidence beyond that in the written administrative record, but § 124.305(c) contemplates a hearing in suspension appeals. Revised § 134.407(a) would clarify that it does not apply to suspension appeals.

Section 134.212 allows motions for summary decision in all cases under this part. Proposed § 134.408(a) merely refers to the general provisions of § 134.212. Proposed § 134.408(b), summary decision based on fewer than all grounds, would extend the general provision for summary decision on fewer than all grounds (proposed § 134.212(e)). If the SBA moves for summary decision on one or more grounds and the Judge finds no genuine issue of material fact as to whether the SBA determination meets the required standard of review and that the SBA is entitled to judgment as a matter of law, the Judge would grant the motion and dismiss the appeal.

Current § 134.408, decision on appeal, would be redesignated as § 134.409 and revised to delete the second sentence of paragraph (b), which is unnecessary.

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

SBA has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. The proposed rule would revise some of the rules of practice for SBA administrative proceedings to simplify those rules and to make them easier for the few small businesses that engage in administrative litigation with the SBA to understand and to use. Accordingly, the proposed rule is purely procedural and would not affect the operations of small entities.

For purposes of the Paperwork Reduction Act (44 U.S.C. ch. 35), SBA certifies that this proposed rule would impose no new reporting or record-keeping requirements on firms. This proposed rule would make revisions to certain procedures for administrative litigation, and those revisions would not necessitate any additional reports to SBA and would not require the maintenance of any additional records beyond those that firms currently make or maintain.

OMB has determined that this proposed rule is not a ''significant'' regulatory action within the meaning of Executive Order 12866. The proposed rule is merely procedural and, therefore, it would not have an annual economic effect of $100 million or more, and it would have no adverse effect on any sector of the economy or on State, local, or tribal governments or communities.

For purposes of Executive Order 12988, SBA certifies that it has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order. This proposed action does not have retroactive or preemptive action.

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

List of Subjects

13 CFR Part 121

Government procurement, government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 124

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

13 CFR Part 134

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

Accordingly, for the reasons stated in the preamble, SBA proposes to amend parts 121, 124, and 134 of Title 13, Code of Federal Regulations (CFR) as follows:

PART 121—[AMENDED]

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

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

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

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

* * * * *

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

3. Revise § 121.1101 to read as follows:

§ 121.1101 Are formal size determinations subject to appeal?

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

4. Revise § 121.1102 to read as follows:

§ 121.1102 Are NAICS code designations subject to appeal?

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

PART 124

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

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

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

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

* * * * *

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

* * * * *

7. Amend § 124.304 as follows:

a. Revise the second sentence of paragraph (b) and remove the last sentence; and

b. Revise the last sentence of paragraph (e).

The revisions read as follows:

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

* * * * *

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

* * * * *

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

* * * * *

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

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

* * * * *

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

* * * * *

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

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

* * * * *

(i) The 8(a) contractor may appeal SBA's denial of a waiver request by filing a petition with OHA pursuant to part 134 of this title within 45 days after the contractor receives the Administrator's decision.

PART 134

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

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

11. Amend § 134.101 as follows:

a. Add new definitions for ''Appeal petition'' and ''NAICS code'' in alphabetical order;

b. Revise the definitions for ''Party,'' ''Petition,'' and ''Pleading'; and

c. Remove the definition for ''SIC code.''

The revisions and additions read as follows:

§ 134.101 Definitions.

* * * * *

Appeal petition has the same meaning as *petition.*

* * * * *

NAICS code means North American Industry Classification System code.

* * * * *

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

* * * * *

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

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

* * * * *

12. Amend § 134.102 as follows:

a. Revise paragraph (d);

b. In paragraph (k), remove the acronym ''SIC'' and replace it with the acronym ''NAICS''; and

c. In paragraph (m), delete the last word ''and''; redesignate existing paragraph (n) as paragraph (r); and add new paragraphs (n) through (q).

The revisions and additions read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(d) The eligibility of any bank or non-bank lender to continue to participate in SBA loan programs under the Act and part 120 of this chapter, or to do so with preferred or certified status, and any other appeal that is specifically authorized by part 120 of this chapter;

* * * * *

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

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

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

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

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

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

* * * * *

§ 134.103 [Amended]

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

14. Amend § 134.201 as follows:

a. Designate the first two sentences of the existing undesignated text as paragraph (a);

b. Designate the last sentence of the existing undesignated text as paragraph (b); and

c. In the first sentence of redesignated paragraph (a), remove the acronym ''SIC'' and add in its place the acronym ''NAICS.''

15. Revise § 134.202 to read as follows:

§ 134.202 Commencement of cases.

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

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

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

(3) In applications for an award of fees pursuant to subpart E of this part, no later than 30 days after the decision to which it applies becomes final;

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

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

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

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

16. Revise § 134.203 to read as follows:

§ 134.203 The petition.

(a) A petition must contain the following:

(1) The basis of OHA's jurisdiction;

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

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

(4) The relief being sought;

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

(6) A certificate of service (see § 134.204(d)); and

(7) In a debt collection case, a statement showing when the petitioner received the SBA notice initiating the debt collection proceeding (see § 140.3 of this chapter).

(b) A petition also must contain additional information or documents as required by the applicable program regulations or by other subparts of this part 134. For SBA Employee Disputes, see Standard Operating Procedure 37 71 02.

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

17. Amend § 134.204 as follows:

a. Revise the heading of the section;

b. Revise paragraphs (a) through (d); and

c. Remove paragraph (e) and redesignate existing paragraph (f) as paragraph (e).

The revisions read as follows:

§ 134.204 Filing and service requirements.

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

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

(1) OHA accepts filings between the hours of 8:30 a.m. and 5:00 p.m. eastern time at the following address: Office of Hearings and Appeals, Small Business Administration, 409 Third Street, SW., Suite 5900, Washington, DC 20416. OHA's telephone number is (202) 401–8203. The number for OHA's facsimile machine is (202) 205–7059.

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

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

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

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

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

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

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

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

(3) If the SBA is a party, the SBA must be served, as required by the applicable program regulations or by other subparts of this part 134. If the SBA office for service is not specified elsewhere, serve: Office of General Counsel, Small Business Administration, 409 Third Street, SW., Washington, DC 20416. For SBA Employee Disputes, see Standard Operating Procedure 37 71 02.

(d) *Certificate of service.* A certificate of service shows how, when, and to whom service was made. Every pleading and other submission filed with OHA

and served on the other parties must include a certificate of service. The certificate should state: ''I certify that on [date], I caused the foregoing document to be served by [either ''placing a copy in the mail,'' ''sending a copy by facsimile,'' ''personally delivering a copy,'' or ''giving a copy to a delivery service,''] upon the following: [list name, address, telephone number, and facsimile number of each party served].'' The certificate must be signed and include the typed name and title of the individual serving the pleading or other submission.

* * * * *

18. Revise § 134.205 to read as follows:

§ 134.205 Motion for a more definite statement.

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

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

19. Revise § 134.206 to read as follows:

§ 134.206 The answer or response.

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

(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 which are not answered in accordance with paragraph (a)(2)(i) of this section will be deemed admitted unless injustice would occur.

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

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

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

20. Amend § 134.207 to read as follows:

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

b. Revise paragraph (b); and

c. Revise paragraph (d).

The revisions read as follows:

§ 134.207 Amendments and supplemental pleadings.

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

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

* * * * *

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

21. Revise § 134.208 to read as follows:

§ 134.208 Representation in cases before OHA.

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

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

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

22. Revise § 134.210 to read as follows:

§ 134.210 Intervention.

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

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

23. Amend § 134.211 as follows:

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

b. Add a new paragraph (b);

c. Revise redesignated paragraph (e); and

d. Add a new paragraph (f).

The revisions and additions read as follows:

§ 134.211 Motions.

* * * * *

(b) Except when a party is filing a motion to dismiss or a motion for summary decision, a party must make reasonable efforts to contact all non-moving parties prior to filing the motion

to determine whether they oppose the motion, and must set forth in the motion all non-moving parties' positions. If the moving party is unable to determine a non-moving party's position, the moving party must describe in the motion the efforts made to contact such non-moving party.

* * * * *

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

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

24. Amend § 134.212 as follows:

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

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

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

§ 134.212 Summary Decision.

* * * * *

(e) *Appeal petitions from SBA determinations (other than 8(a) determinations).* In a case involving an appeal petition, except as provided in subpart D of this part, if SBA has provided multiple grounds for the determination being appealed, SBA may move for summary decision on one or more grounds. If the Judge finds that there is no genuine issue of material fact and the SBA is entitled to a decision in its favor as a matter of law as to any such ground, the Judge will grant the motion for summary decision and dismiss the appeal.

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

26. Amend § 134.214 as follows:

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

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

The revisions and additions read as follows:

§ 134.214 Subpoenas.

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

* * * * *

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

§ 134.215 [Amended]

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

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

§ 134.217 Settlement.

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

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

§ 134.226 The decision.

* * * * *

(b) * * * Time limits for decisions in other types of cases, if any, are indicated either in the applicable program regulations or in other subparts of this part 134.

* * * * *

30. Revise § 134.227 to read as follows:

§ 134.227 Finality of decisions.

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

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

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

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

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

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

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

31. Amend § 134.228 as follows:

a. In paragraph (b), remove the words ''serve and file with OHA'' and add in their place the words ''file and serve'';

b. Revise paragraph (a).

The revisions read as follows:

§ 134.228 Review of initial decisions.

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

* * * * *

32. Revise § 134.229 to read as follows:

§ 134.229 Termination of jurisdiction.

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

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

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

§ 134.301 [Amended]

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

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

§ 134.302 Who may appeal.

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

* * * * *

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

* * * * *

36. Revise § 134.303 to read as follows:

§ 134.303 Advisory opinions.

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

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

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

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

(1) If the appeal is from a size determination in a pending procurement or pending Government property sale, then the appeal petition must be filed and served within 15 days after appellant receives the size determination;

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

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

* * * * *

38. Amend § 134.305 as follows:

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

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

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

§ 134.305 The appeal petition.

* * * * *

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

* * * * *

39. Amend § 134.306 as follows:

a. Revise the section heading;

b. Designate as paragraph (a) the first sentence of the existing undesignated text;

c. Remove the last sentence of the existing undesignated text; and

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

§ 134.306 Transmission of the case file and solicitation.

* * * * *

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

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

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

(a) * * *

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

* * * * *

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

§ 134.309 Response to an appeal petition.

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

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

* * * * *

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

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

44. Revise § 134.313 to read as follows:

§ 134.313 Applicability of subpart B provisions.

Although the provisions of subpart B of this part and this subpart C apply to appeals from size determinations and NAICS code designations, the provisions of this subpart shall govern.

§ 134.314 [Amended]

45. In § 134.314, remove the acronym ''SIC'' and replace it with the acronym ''NAICS.''

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

§ 134.316 The decision.

* * * * *

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

* * * * *

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

47. Remove existing § 134.317, and redesignate existing § 134.318 as § 134.317 and revise it, to read as follows:

§ 134.317 Return of the case file.

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

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

§ 134.402 Appeal petition.

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

49. Amend § 134.403 as follows:

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

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

50. Amend § 134.406 as follows:

a. Revise paragraph (a);

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

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

d. Revise paragraph (d); and

e. Revise paragraph (e).

The revisions and additions read as follows:

§ 134.406 Review of the administrative record.

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

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

(c) The administrative record must contain all documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker, and those SBA officials that either recommended for or against the decision, relied. * * * The petitioner may object to the absence of a document, previously submitted to, or sent by, SBA, which the petitioner believes was erroneously omitted from the administrative record. In the absence of any objection by the petitioner or a finding by the Judge pursuant to paragraph (e) of this section that the record is insufficiently complete to decide whether the determination was arbitrary, capricious, or contrary to law, the administrative record submitted by SBA shall be deemed complete.

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

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

§ 134.407 [Amended]

51. In § 134.407, paragraph (a), remove the word ''The'' at the beginning and replace it with the words ''Except in suspension appeals, the.''

§ 134.408 [Redesignated as § 134.409]

52. Redesignate existing § 134.408 as § 134.409.

53. Add a new § 134.408 as follows:

§ 134.408 Summary decision.

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

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

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

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

§ 134.409 [Amended]

54. In redesignated § 134.409, paragraph (b), remove the second sentence.

Hector V. Barreto,

Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 02–ASO–4]

Proposed Establishment of Class D Airspace; Greenville Donaldson Center, SC, Proposed Amendment of Class E2 Airspace; Greer, Greenville-Spartanburg Airport, SC, and Proposed Amendment of Class E5 Airspace; Greenville, SC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to establish Class D airspace at Greenville Donaldson Center, SC, and amend Class E5 airspace at Greenville, SC. A Federal contract tower with a weather reporting system is being constructed at the Donaldson Center Airport. Therefore, the airport will meet the criteria for establishment of Class D Airspace. Class D surface area airspace is required when the control tower is open to contain existing Standard Instrument Approach Procedures (SIAPs) and other Instrument Flight Rules (IFR) operations at the airport. This action would establish Class D airspace extending upward from the surface to and including 2,500 feet MSL within a 4.2-mile radius of the Donaldson Center Airport. A regional evaluation has determined the existing Class E5 airspace area should be amended to contain the Nondirectional Radio Beacon (NDB) or Global Positioning System (GPS) Runway (RWY) 5 SIAP. As a result, additional controlled airspace extending upward from 700 feet Above Ground Level (AGL) southwest of Donaldson Center Airport is needed to contain the SIAP. This action would also make a technical amendment to the Class E2 airspace at Greer, Greenville-Spartanburg Airport, SC, and the Class E5 airspace description at Greenville, SC, by changing the name of the Greenville-Spartanburg Airport to the Greenville-Spartanburg International Airport.