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SMALL BUSINESS ADMINISTRATION

13 CFR Part 134

RIN 3245-AG09

Rules of Procedure Governing Cases Before the Office of Hearings and Appeals

AGENCY: U.S. Small Business Administration.

ACTION: Direct final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its regulations governing appeals before the SBA's Office of Hearings and Appeals (OHA). OHA is SBA's administrative tribunal, and these regulations are procedural by nature. These revisions codify current practices to make them more transparent, and clarify some existing rules of procedure to make them more understandable particularly to OHA's many *pro se* litigants.

DATES: *Effective Date:* This rule is effective September 20, 2010 without further action, unless significant adverse comment is received by September 7, 2010. If significant adverse comment is received, SBA will publish a timely withdrawal of the rule in the **Federal Register**.

Applicability Date: This rule applies to all appeals filed on or after the Effective Date.

ADDRESSES: You may submit comments, identified by RIN: 3245-AG09, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail, for paper, disk, or CD-ROM submissions:* Delorice Price Ford, Assistant Administrator for Hearings and Appeals, U.S. Small Business Administration, Office of Hearings and Appeals, 409 Third Street, SW., Washington, DC 20416.

- *Hand Delivery/Courier:* Delorice Price Ford, Assistant Administrator for Hearings and Appeals, U.S. Small Business Administration, Office of Hearings and Appeals, 409 Third Street, SW., Washington, DC 20416.

SBA will post all comments on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.Regulations.gov>, please submit the information to Delorice Price Ford, Assistant Administrator for Hearings and Appeals, U.S. Small Business Administration, Office of Hearings and Appeals, 409 Third Street, SW., Washington, DC 20416, or send an e-mail to Delorice.Ford@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT:

Delorice Price Ford, Assistant Administrator for Hearings and Appeals, at (202) 401-8200 or Delorice.Ford@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Small Business Administration is amending its regulations governing appeals before the SBA's Office of Hearings and Appeals (OHA). OHA is SBA's administrative tribunal that provides an independent, quasi-judicial forum to appeal various types of decisions. The matters addressed on appeal include: SBA formal size determinations; contracting officer designations of North American Industry Classification System (NAICS) codes for procurements government-wide; certain SBA determinations relating to 8(a) BD program eligibility, graduation, suspension, and termination; Service-Disabled Veteran-Owned Small Business Concern status appeals, SBA employee dispute appeals; and employee salary offsets.

In order to increase transparency and understanding of its appeals process, SBA is amending its hearings and appeals regulations to codify current practices, and to clarify certain existing regulations, particularly for the many *pro se* litigants who file appeals with OHA. Some of these revisions change

existing procedures; however, we believe these revisions have minimal impact on the public.

Among other things, these amendments codify OHA's longstanding practices on access to appeal files and protective orders as well as its practice of citing its prior decisions as precedent. These amendments also permit the filing and service of pleadings by e-mail; limit the number of pages for each appeal petition unless OHA approves in advance; and clarify the time period for filing an appeal. SBA is also adding provisions promoting the use of alternative dispute resolution procedures generally, and a new subpart on SBA employee dispute resolution procedures.

Consideration of Comments. SBA is publishing this rule as a direct final rule because it believes that this rule is routine and non-controversial. This rule merely codifies existing procedures and clarifies practices that are also purely procedural in nature. Because this rule affects only the procedural regulations of SBA's Office of Hearings and Appeals, SBA believes that notice and comment is unnecessary. Thus, SBA believes there is good cause to bypass notice and comment and proceed to a direct final rule pursuant to 5 U.S.C. 553(b). SBA believes that this direct final rule will not elicit any significant adverse comments. However, if such comments are received, SBA will publish a timely notice of withdrawal in the **Federal Register**.

II. Section-by-Section Analysis

A. Subpart A

SBA is adding a definition for "business day" to § 134.101. SBA is making several non-substantive revisions to § 134.102 on OHA's jurisdiction. These revisions include: removing from § 134.102(k) a lengthy definition that also appears in § 134.101; removing and reserving § 134.102(d), (f), and (m) to conform to the 2009 elimination of OHA appeals of SBA enforcement actions against SBA lenders, intermediaries, and non-lending technical assistance providers, 73 FR 75524, Dec. 11, 2008; removing and reserving § 134.102(n) to conform to the 2008 elimination of OHA appeals for Small Disadvantaged Business determinations, 73 FR 57495, Oct. 3, 2008; adding to § 134.102(r) a reference to new subpart H and updating website

information; and adding to § 134.102(t) a list of the means by which the Administrator may refer a proceeding to OHA. SBA is removing and reserving § 134.103, on time periods and deadlines, and placing these rules in § 134.202(d).

B. Subpart B

SBA is shortening the subpart heading to read "Subpart B—Rules of Practice". Section 134.201 sets out where to locate the rules applying to specific types of OHA proceedings and how to determine which rule governs in the event of conflicting rules. SBA is making non-substantive revisions to this section to list more of the proceedings to which specific rules apply and to increase clarity.

Section 134.202(a) governs the commencement of cases initiated by a party other than SBA. The current rule provides a 45-day deadline for filing an appeal petition and an incomplete list of the types of proceedings that have different deadlines. SBA is amending § 134.202(a) by replacing the 45-day deadline with a reference to the regulations governing the specific type of appeal. SBA is also adding a new rule providing that, where the SBA action or determination being appealed contains a different time period (or deadline) for filing an appeal petition than does the applicable regulation, then the longer time period (or later deadline) governs. Thus, a petitioner will have the benefit of the longer time period or deadline.

SBA is adding to § 134.202 new paragraph (d) on the calculation and modification of time periods and deadlines. The new § 134.202(d) provides a clearer explanation of the rules currently at § 134.103 and a detailed example of how to count days. OHA staff receive many inquiries on how to count days and where to find this rule. SBA believes the revisions, example, and relocation to § 134.202(d) will reduce the number of inquiries.

Section 134.203 sets out the components of an appeal petition. SBA is adding the word "appeal" to the section heading, a reference to § 134.102 in § 134.203(a)(1), and the petitioner's e-mail address to the requirements of § 134.203(a)(5). SBA is removing current § 134.203(a)(7) and the second sentence of current § 134.203(b). The provisions in those places are redundant.

New § 134.203(d) will limit an appeal petition to 20 pages unless prior leave is granted, and requires a table of authorities only if more than 20 authorities are cited. New § 134.203(d) also provides additional guidance to petitioners, such as that it is unnecessary to attach documents

already submitted to SBA, because SBA will submit these directly to OHA.

New § 134.203(e) has the heading, "Motion for a more definite appeal petition." It revises the regulation currently at § 134.205. Section 134.203(e) will shorten, from 15 to five days, the time period for the respondent (almost invariably the SBA) to file this motion; will permit the Judge to order a more definite appeal petition on his or her own initiative; and will permit the Judge to dismiss an appeal with prejudice for the petitioner's failure to comply with such an order. New § 134.203(f) informs petitioners that OHA issues a Notice and Order after an appeal petition is filed and that, should a party not receive this document, it should contact OHA.

Section 134.204 concerns the filing and service of pleadings and other submissions. SBA is amending § 134.204 to include introductory text stating that a submission requires filing, service, and a certificate of service. The only substantive change is the addition of e-mail to the permitted methods of filing and service set out in § 134.204(a). Revised § 134.204(b) includes OHA's e-mail address for filings and a reference to 28 U.S.C. 1746, a provision helpful to parties in preparing exhibits. Current § 134.204(e) has been moved to § 134.204(c)(4) and revised to include a reference to the section on protective orders. Section 134.204(d), on the certificate of service, has been revised for clarity and to accommodate e-mail service.

SBA is moving current § 134.205 to § 134.203(e), as discussed above, and replacing § 134.205 with a new section that has the heading, "The appeal file, confidential information, and protective orders." New § 134.205 fully states in one place OHA's longstanding practices involving confidential information and access to appeal files.

New § 134.205(a) sets out the typical contents of an appeal file, and § 134.205(b) describes the procedure for a party to file with OHA pleadings containing the party's own confidential information, including service of redacted copies on other non-government parties. New § 134.205(c) explicitly refers members of the public to the Freedom of Information Act (FOIA), 5 U.S.C. 552, for access to appeal files. Section 134.205(d) codifies OHA's practice of permitting a party in a pending appeal to examine and copy its own submissions in the appeal file, as well as any other information there that would not be exempt from disclosure under the FOIA. This "party access" is a matter of due process, and parties typically use it to ensure that the

appeal file does contain all of the party's own submissions, including any sent previously to the SBA office that issued the determination being appealed.

Section 134.205(e) codifies OHA's longstanding practice of issuing protective orders that set out the terms under which outside counsel may have access to all information in a pending appeal file except for tax returns and privileged information. New § 134.205(f) codifies OHA's longstanding practice of publishing its decisions even though these decisions may contain confidential information, and procedures to request a redacted public decision. The only substantive change from current practice in new § 134.205 is that OHA's Web site will contain detailed information on its protective order procedure.

Section 134.206 concerns respondents' pleadings. SBA has made three revisions to this section. The first removes the last sentence in § 134.206(a)(1), a sentence rendered unnecessary by the addition of subpart H. The second rewrites § 134.206(b) to codify OHA practices in cases where the appeal of an SBA determination requires the Agency to file and serve an administrative record, practices which for many years have been set out in the initial notice and order. The third adds § 134.206(e) to codify OHA practice relating to petitioners' replies to responses.

SBA is amending § 134.207 to include references to § 134.211 and to explicitly state that the Judge, on his or her own initiative, may order an amendment or a supplemental pleading. SBA is amending § 134.209 to note that false statements in pleadings are subject to criminal penalties, and that misconduct is subject to sanctions, with a reference to § 134.219.

Section 134.211 governs motion practice. SBA is changing two deadlines in this section. First, the deadline for responses to a motion, in § 134.211(c), changes from 20 days after service of the motion to 15 days. The 20-day period for response is much longer than needed, and can delay the issuance of a decision. Further, a party needing more time to respond to a motion has the option of moving for more time under § 134.211(f). Second, the deadline for filing a motion to extend time, in § 134.211(f), has been changed from "two days" before the original deadline to "two business days". This change will eliminate the uncertainty in counting back days when a weekend or a Federal holiday is encountered. Other revisions in this section are to clarify existing procedures.

SBA is changing the words “summary decision” in the heading and text of § 134.212 to “summary judgment”, to more accurately reflect the procedures described therein, and to avoid confusion with the summary decision set out in § 134.226(a)(3). SBA also is shortening the deadline, in § 134.212(a), for filing a response to either the original motion or a cross-motion from the current 20 days after service to 15 days. A party needing more time to respond may move for more time under § 134.211(f). New § 134.212(a)(4) establishes a deadline of 15 days for the respondent to file its answer or response under § 134.206 in the event the respondent has not yet made this filing, the Judge denies a motion for summary judgment, and the Judge does not establish a different deadline. Other revisions to § 134.212 clarify the rule.

SBA is amending § 134.213(c) by adding a reference to the section on protective orders. SBA is amending § 134.214, on subpoenas, by shortening the deadlines related to motions to quash from 10 days to five days; and by removing two unneeded sentences.

Section 134.216 concerns alternative dispute resolution (ADR). SBA adds two new provisions to this section to further Federal policy encouraging administrative agencies to use ADR (*see* 5 U.S.C. 571–572), and SBA’s firm commitment to the greater use of ADR (*see* 64 FR 27843, May 21, 1999). The first provision adds new § 134.216(b) to permit a Judge to offer ADR to the parties. The second provision adds new § 134.216(c) to permit designation of either a Judge or an OHA attorney to serve as a neutral in ADR procedures. An OHA-provided neutral will not be involved in the adjudication if mediation fails to resolve all issues in a case.

SBA is revising the last sentence of § 134.218(c) to clarify that a denial of a motion for recusal may be appealed “within 5 days” rather than “immediately”.

SBA is amending § 134.219 to list five sanctions a Judge may apply for misconduct by a party or its counsel. These sanctions include: Ordering a pleading or evidentiary filing to be struck from the record; dismissing an appeal with prejudice; suspending counsel from practice before OHA; filing a complaint with the applicable State bar; and taking any other action that is appropriate to further the administration of justice.

SBA is amending § 134.222, on oral hearings, to delete paragraph (a)(3), a provision applicable only to administrative wage garnishment cases, which OHA no longer hears; and to

correct typographical errors in § 134.222(d). SBA is amending § 134.223 to clarify that the weight given to hearsay evidence is at the Judge’s discretion.

SBA is removing and reserving § 134.224, on standards for decision. The standard for decision is provided in the regulations pertaining to each specific type of case, and this section causes confusion. SBA is removing § 134.225(b), on public access to the record, as unnecessary given its inclusion in § 134.205.

SBA is amending § 134.226(a) to add two new provisions that codify, in part, existing practices. New § 134.226(a)(2) provides that all OHA decisions create precedent, unless either a regulation governing a specific type of appeal provides otherwise, or the Judge designates a particular decision as not to be cited as precedent. The practice of citing its prior decisions as precedent has been an accepted part of OHA’s quasi-judicial function since OHA’s inception in 1983. SBA believes it appropriate to codify the practice.

New § 134.226(a)(3) permits issuance of an abbreviated version of a decision where the Judge finds that a full decision would not advance understanding of law, regulation, or policy and the underlying facts and law are of a routine and non-complex nature. OHA’s longstanding practice is to issue short decisions and orders dismissing appeals in appropriate cases, and this rule codifies the practice.

C. Subpart C

SBA makes several changes to subpart C. First, SBA amends § 134.302(b) to correct an SBA official’s title. Second, SBA amends § 134.305 to require that a size appeal include a copy of the size determination being appealed, and to add an e-mail address and fax number for service to the Associate General Counsel for Procurement Law. Third, SBA is amending § 134.306(b) to permit a contracting officer to provide an electronic link to the solicitation in lieu of a paper copy. Fourth, SBA makes a technical revision to § 134.315 to conform to a revision made in § 134.225.

Finally, SBA adds new section § 134.318 regarding NAICS appeals. This section references certain sections of part 121 that apply to NAICS appeals, clarifies the effect of OHA’s decision in a NAICS appeal, and permits early, summary dismissal of a NAICS appeal in certain instances to codify current, longstanding practice.

D. Subpart D

SBA amends § 134.403 to permit service of the appeal petition by e-mail, and to make various editorial revisions.

SBA is also deleting § 134.404 as redundant, and replacing it with a new section providing a 45-day deadline for filing an 8(a) appeal. The 45-day deadline does not represent any change, as it is the default deadline in current § 134.202. Because SBA is revising § 134.202 to direct parties to the regulations governing specific appeals, the regulations governing 8(a) appeals will need to contain the deadline. Thus, it is being added here. SBA is also revising § 134.405 to eliminate the reference to § 134.202 contained there.

In § 134.406, SBA makes revisions to paragraphs (c) and (e). Section 134.406(c) concerns the content of the administrative record in 8(a) appeals. The revised rule adds a heading to § 134.406(c) and divides it into paragraphs (c)(1) to (c)(3) for ease of use. The revised rule also adds one sentence at the end of new paragraph (c)(1) and two sentences at the end of new paragraph (c)(2) to codify and make more transparent longstanding practices regarding SBA claims of privilege and petitioner objections. Section 134.406(e) concerns remands in 8(a) appeals. The revised rule adds a heading to § 134.406(e) and divides it into paragraphs (e)(1), (e)(2), and (e)(4) for ease of use. SBA also adds new paragraph (e)(3) to codify the longstanding practice of remanding an 8(a) appeal where the SBA determination being appealed raises a new ground not included in the initial SBA determination. Apart from these revisions, and the correction of an SBA official’s title in paragraph (e)(1), there are no other changes to the text of § 134.406.

E. Subpart E

SBA is amending § 134.505 to require the appeal petition in Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) cases to include a copy of the determination being appealed and the petitioner’s e-mail address. The revisions also provide the e-mail addresses for the SBA officials whom the petitioner must serve.

F. Subpart F

SBA corrects cross-references in §§ 134.601, 134.602, 134.606, and 134.611 to conform with redesignations made to this subpart in 1998 and 2005. 63 FR 35766, June 30, 1998; 70 FR 8927, Feb. 24, 2005.

G. Subpart H

SBA is adding Subpart H setting forth the rules of practice for OHA appeals of SBA Employee Disputes. Subpart H replaces the portions of Standard Operating Procedure (SOP) 37 71 that deal with OHA appeals, and codifies several items of longstanding OHA practice.

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

Executive Order 12866

OMB has determined that this rule does not constitute a "significant regulatory action" under Executive Order 12866. This rule codifies current practices of the SBA's Office of Hearings and Appeals and clarifies other practice rules. As such, the rule has no effect on the amount or dollar value of any Federal contract requirements or of any financial assistance provided through SBA. Therefore, the rule is not likely to have an annual economic effect of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy. In addition, this rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of such recipients, nor raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of that Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

This rule does not have Federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government, as specified in the Order. As such it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule does not impose new reporting or record keeping requirements.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601-12, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities.

However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This rulemaking addresses the rules of practice governing cases before the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA). OHA is SBA's administrative tribunal, and these regulations are procedural by nature. This rule codifies current practices to make them more transparent, and clarifies other rules. The increased clarity and transparency of OHA's procedural rules will benefit small businesses litigating matters before OHA, especially those litigating pro se. Few of these revisions change existing procedures, and those that do have minimal effect on small entities.

Therefore, within the meaning of the RFA, SBA certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because the rulemaking is procedural and imposes no significant additional requirements on small entities.

List of Subjects in 13 CFR Part 134

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

■ For the reasons stated in the preamble, SBA amends part 134 of title 13 of the Code of Federal Regulations as follows:

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

■ 1. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 637(a), 637(m), 648(1), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart A—General Rules

■ 2. Amend § 134.101 by adding the definition of "Business day", to read as follows:

§ 134.101 Definitions.

* * * * *

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

* * * * *

■ 3. Amend § 134.102 by removing and reserving paragraphs (d), (f), (m), and (n); and by revising paragraphs (k), (r), (s), and (t) to read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(d) [Reserved]

* * * * *

(f) [Reserved]

* * * * *

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

* * * * *

(m) [Reserved]

(n) [Reserved]

* * * * *

(r) The decision of the Appropriate Management Official in 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 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; and

(t) Any other hearing, determination, or appeal proceeding referred to OHA by the Administrator of SBA, either through an SOP, Directive, Procedural Notice, or individual request by the Administrator to the AA/OHA.

§ 134.103 [Removed and Reserved]

■ 4. Remove and reserve § 134.103.

■ 5. Revise the heading for subpart B to read as follows:

Subpart B—Rules of Practice

■ 6. Revise § 134.201 to read as follows:

§ 134.201 Scope of the rules in this subpart B.

(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.*);

(2) For 8(a) BD appeals, in subpart D of this part (§ 134.401 *et seq.*);

(3) For appeals from Service-Disabled Veteran-Owned Small Business Concern protest determinations, in subpart E of this part (§ 134.501 *et seq.*);

(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.*); and

(7) 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.

■ 7. Amend § 134.202 by revising paragraph (a) and by adding new paragraph (d), to read as follows:

§ 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.

* * * * *

(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.

■ 8. Amend § 134.203 as follows:

■ a. Revise the section heading;

■ b. Revise paragraphs (a) and (b); and

■ c. Add new paragraphs (d), (e), and (f).

§ 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;

(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.

* * * * *

(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 otherwise 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.

■ 9. Revise § 134.204 to read as follows:

§ 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.

■ 10. Revise § 134.205 to read as follows:

§ 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, 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.

(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.

■ 11. Amend § 134.206 by removing the last sentence of paragraph (a)(1); by revising paragraph (b); and by adding new paragraph (e) to read as follows:

§ 134.206 The answer or response.

* * * * *

(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.

* * * * *

(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.

■ 12. Amend § 134.207 as follows:

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

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

§ 134.207 Amendments and supplemental pleadings.

(a) * * * 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. * * * The Judge, on his or her own initiative, may order a party to file and serve an amendment to a pleading.

(b) * * * 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 Judge, on his or her own initiative, may order a party to file and serve a supplemental pleading.

* * * * *

■ 13. In § 134.209, add two sentences at the end, to read as follows:

§ 134.209 Requirement of signature.

* * * False statements are subject to criminal penalties. Any misconduct is subject to sanctions (*see* § 134.219).

■ 14. Amend § 134.211 as follows:

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

■ b. Revise paragraph (c);

■ c. In paragraph (e), revise the second sentence and remove the third sentence; and

■ d. In paragraph (f), add the word “business” after the word “two”.

§ 134.211 Motions.

(a) * * * A motion must be filed, served, and accompanied by a certificate of service (*see* § 134.204).

* * * * *

(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.

* * * * *

(e) * * * 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 least two business days before the original deadline.

■ 15. Revise § 134.212 to read as follows:

§ 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.

(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.

§ 134.213 [Amended]

■ 16. In § 134.213, paragraph (c), add the words “(see § 134.205)” after the words “protective order”.

■ 17. Amend § 134.214 by revising paragraphs (a) and (b) to read as follows:

§ 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.

* * * * *

(d) *Motion to quash.* A motion to limit or quash a subpoena must be filed and served within 5 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 5 days after service of the motion, unless a shorter time is specified by the Judge.

■ 18. Amend § 134.216 as follows:

■ a. Designate the existing text as paragraph (a); and

■ b. Add new paragraphs (b) and (c).

§ 134.216 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.

■ 19. Amend § 134.218 by revising the last sentence of paragraph (c), to read as follows:

§ 134.218 Judges.

* * * * *

(c) * * * 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.

■ 20. Revise § 134.219 to read as follows:

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

■ 21. Amend § 134.222 by removing paragraph (a)(3) and revising paragraph (d).

The revisions read as follows:

§ 134.222 Oral hearing.

* * * * *

(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.

* * * * *

■ 22. Amend § 134.223 by adding a new sentence at the end of paragraph (b), to read as follows:

§ 134.223 Evidence.

* * * * *

(b) * * * Weight to be afforded hearsay evidence is at the discretion of the Judge.

§ 134.224 [Removed and Reserved]

■ 23. Remove and reserve § 134.224.

§ 134.225 [Amended]

■ 24. Amend § 134.225 by removing paragraph (b) and by redesignating paragraph (c) as paragraph (b).

■ 25. Amend § 134.226 by revising paragraph (a), to read as follows:

§ 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
(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.

* * * * *

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

§ 134.302 [Amended]

■ 26. Amend § 134.302(b) by removing the words "Associate Administrator for Business Development" and by adding, in their place, the words "Director, Office of Business Development".

■ 27. Amend § 134.305 by revising paragraphs (a)(1), (b)(5), and (c), to read as follows:

§ 134.305 The appeal petition.

(a) * * *

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

* * * * *

(b) * * *

(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.

* * * * *

§ 134.306 [Amended]

■ 28. In § 134.306, paragraph (b), after the words "send to OHA", add the words "an electronic link to or".

■ 29. Amend § 134.315 by revising the first sentence to read as follows:

§ 134.315 The record.

Where relevant, the provisions of § 134.225 apply. * * *

■ 30. Add § 134.318, to read as follows:

§ 134.318 NAICS appeals.

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

(b) Effect of OHA's decision. If OHA grants the appeal (changes the NAICS code), and the contracting officer receives OHA's decision by the date offers are due, the contracting officer must amend the solicitation to reflect the new NAICS code. If the contracting officer receives OHA's decision after the date offers are due, OHA's decision will not apply to the pending procurement, but will 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.

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

■ 31. Revise § 134.403 to read as follows:

§ 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.

■ 32. Revise § 134.404 to read as follows:

§ 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.

§ 134.405 [Amended]

- 33. In § 134.405, paragraph (a)(2), remove the words “under § 134.202”.
- 34. Amend § 134.406 by revising paragraphs (c) and (e) to read as follows:

§ 134.406 Review of the administrative record.

* * * * *

(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, however, 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.

* * * * *

(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 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.

Subpart E—Rules of Practice for Appeals From Service-Disabled Veteran Owned Small Business Concern Protests

- 35. Amend § 134.505 by revising paragraphs (a)(2), (a)(4), (b)(1), and (b)(4) to read as follows:

§ 134.505 What are the requirements for an appeal petition?

(a) * * *

(2) A statement that the petition is appealing an SDVO SBC protest determination issued by the D/GC, a copy of the protest determination being appealed, and the date the petitioner received the SDVO SBC protest determination;

* * * * *

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

(b) * * *

(1) Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW.,

Washington, DC 20416, facsimile (202) 205-6390;

* * * * *

(4) 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.

* * * * *

Subpart F—Implementation of the Equal Access to Justice Act**§ 134.601 [Amended]**

- 36. In § 134.601 remove “134.405(b)” and add in its place “134.605(b)”.

§ 134.602 [Amended]

- 37. In § 134.602, in the introductory text, remove “134.406” and add in its place “134.606”; and in paragraph (a), by remove “134.403” and add in its place “134.603”.

§ 134.606 [Amended]

- 38. In § 134.606, paragraph (a)(4), remove “134.407” and add in its place “134.607”.

§ 134.611 [Amended]

- 39. In § 134.611, paragraph (a)(7), remove “134.408” and add in its place “134.608”.
- 40. Add a new subpart H to read:

Subpart H—Rules of Practice for Employee Disputes

Sec.

134.801	Scope of rules.
134.802	[Reserved]
134.803	Commencement of appeals from AMO decisions.
134.804	The appeal petition.
134.805	After the appeal petition is filed.
134.806	Mediation.
134.807	SBA response.
134.808	The decision.
134.809	Review of initial decision.

§ 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);
- (10) Sanctions (§ 134.219); and
- (11) Review of initial decisions (§ 134.228).

§ 134.802 [Reserved]

§ 134.803 Commencement of appeals from AMO decisions.

(a) An appeal from an AMO decision must be commenced by filing an appeal petition within 15 days from the date the Employee receives the AMO's decision.

(b) If the AMO does not issue a decision, the appeal petition must be filed no sooner than 16 days and no later than 55 days from the date on which the Employee filed the original Statement of Dispute with the AMO.

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

(d) OHA will dismiss an untimely appeal.

§ 134.804 The appeal petition.

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

- (1) A copy of the original Statement of Dispute;
- (2) A copy of the AMO's decision or other response, if any;
- (3) Statement of why the AMO's decision is alleged to be in error;
- (4) Any other pertinent information the OHA Judge should consider;
- (5) A request for mediation, if applicable;
- (6) The Employee's name, home mailing address, daytime telephone and facsimile numbers, e-mail address, and signature; and
- (7) 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 AMO;
- (2) Chief Human Capital Officer, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; and
- (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) *Certificate of Service.* The Employee will attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

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

(e) *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.

§ 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 U.S. Mail upon the Employee at his or her home address, or upon the attorney if represented by an attorney.

§ 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.

§ 134.807 SBA response.

(a) If the appeal goes to adjudication, SBA will file and serve the SBA's response to the appeal and a copy of the Dispute File.

(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 days from the conclusion of mediation or 45 days from the filing of the appeal petition, whichever is later.

(c) The SBA's response and the Dispute File are normally the last

submissions 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.

§ 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 AMO's 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.

§ 134.809 Review of initial decision.

The Request for Review (RFR) process is the same as in § 134.228 except that, for OIG employees:

(a) The RFR must be served on the Counsel to the Inspector General rather than on the Associate General Counsel for General Law; and

(b) The deciding official is the Inspector General (or designee) rather than the Administrator.

Dated: July 30, 2010.

Karen G. Mills,
Administrator.

[FR Doc. 2010-19401 Filed 8-5-10; 8:45 am]

BILLING CODE 8025-01-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 201 and 202

[Release No. 34-62575]

Amendments to the Informal and Other Procedures, Rules of Organization and Program Management, and Rules of Practice; Interim Commission Review of Public Company Accounting Oversight Board Inspection Reports and Regulation P

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is amending its Informal and Other Procedures to add a rule to facilitate interim Commission review of Public Company Accounting Oversight Board