

date of repayment or the date interest increases as determined in accordance with applicable regulations. FSA may waive the accrual of interest if FSA determines that the cause of the erroneous determination was not due to any action of the person.

(d) Interest determined in accordance with paragraph (c) of this section may be waived at the discretion of FSA alone for refunds resulting from those violations determined by FSA to have been beyond the control of the person committing the violation.

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions of, and subject to the rates prescribed in 7 CFR part 792.

(f) Any excess payments made by FSA with respect to any application under this part must be refunded.

(g) In the event that a benefit under this subpart was provided as the result of erroneous information provided by any person, the benefit must be repaid with any applicable interest.

#### **§ 784.17 Offsets and withholdings.**

FSA may offset or withhold any amounts due FSA under this subpart in accordance with the provisions of 7 CFR part 792, or successor regulations, as designated by the Department.

#### **§ 784.18 Assignments.**

Any person who may be entitled to a payment may assign his rights to such payment in accordance with 7 CFR part 1404 or successor regulations as designated by the Department.

Signed at Washington, DC, on March 20, 2002.

**James R. Little,**

*Administrator, Farm Service Agency.*

[FR Doc. 02-7220 Filed 3-21-02; 3:52 pm]

BILLING CODE 3410-05-P

## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Part 121**

**RIN 3245-AE42**

#### **Small Business Size Regulations; Size Standards for Programs of Other Agencies**

**AGENCY:** Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The Small Business Administration (SBA) is revising the procedural regulations that Federal agencies must follow to obtain approval of the SBA Administrator for establishing size standards for use in their programs. This revision will simplify SBA's regulations by requiring agencies to consult with SBA before

proposing a size standard. It requires them to obtain the SBA Administrator's approval before publishing a final rule.

**DATES:** This rule is effective on April 25, 2002.

**FOR FURTHER INFORMATION CONTACT:** Carl Jordan, Office of Size Standards, at (202) 205-6618.

#### **SUPPLEMENTARY INFORMATION:**

##### **Introduction**

The Small Business Act (sec. 3(a) & (b), 15 U.S.C. 632) (the Act) provides for the establishment of small business size standards. The Act authorizes the Administrator of SBA to "specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this Act or any other Act" (emphasis added). The Act gives the SBA Administrator exclusive authority to establish small business size standards for all Federal agencies, in the absence of other specific statutory authority. Unless a statute specifies size standards for an agency's program or gives an agency direct authority to establish size standards, the agency must use the applicable size standards established by SBA. However, the Act allows an agency to "prescribe a size standard for categorizing a business concern as a small business concern" (sec. 3(a)(2)(C) of the Act) provided the contemplated size standard meets certain criteria *and* the agency obtains approval of the SBA Administrator.

Currently, SBA's Small Business Size Regulations in 13 CFR 121.902 describe procedures that agencies must follow before they prescribe size standards for their own use. These regulations require an agency, contemplating the use of size standards different from those established by SBA, to obtain the SBA Administrator's approval to do so before it proposes them for comment as part of its rulemaking process. If an agency believes that size standards different from those established by SBA are appropriate for its purposes, it must propose specific size standards, explain why it believes they are appropriate for their purposes and why SBA's size standards are not, and seek public comment on them. The proposed size standards must be specific and must meet the criteria set forth in the Act and SBA's regulations. Before an agency issues a final rule, it must notify SBA of the size standards it is adopting and provide SBA with copies of public comments received on the proposed size standards.

#### **Reasons for the Change in the Regulation**

Based on its experience in evaluating agencies' requests for special size standards, SBA proposed revisions to its Small Business Size Regulations by modifying what information agencies need to provide to SBA and when formal approval is required (65 FR 4176, dated January 26, 2000). SBA explained in the proposed rule that the purpose of the revision is to: (1) Streamline the rulemaking process; (2) eliminate a step in the approval process in cases where an agency contemplates adopting a size standard different from a proposed size standard approved by the SBA's Administrator; (3) give an agency SBA's advisory input before the agency issues its proposed size standard; and (4) allow SBA to consider in its decision-making process the requesting agency's proposed rule, its explanation and justification for the size standards it intends to adopt, copies of the public comments to the proposed size standards, and a draft copy of the agency's intended final rule.

#### **Summary of New Procedures**

This final rule adopts the proposed changes of January 26, 2000. The comments received on the proposed rule generally supported the proposed revisions (see discussion of comments below). The adopted procedures establish a consultation requirement with SBA's Office of Size Standards before publishing a proposed rule and require agencies to obtain the SBA Administrator's formal approval before adopting the size standards in a final rule.

Consultation with SBA's Office of Size Standards must be in writing and take place at least fourteen (14) calendar days before issuing the proposed rule. It must include what size standard the agency is proposing, to what program it will apply, how the agency arrived at the particular size standard, and why SBA's existing size standards do not satisfy the agency's program requirements. This consultation will allow SBA to review the proposed size standards and advise the agency as soon as practicable of issues that could prevent the SBA Administrator's approval, such as those in conflict with the Act or SBA Small Business Size Regulations. The agency will then have the opportunity to address those issues in either the proposed rule or final rule.

Prior to publishing a final rule, the agency must request and obtain the SBA's Administrator's approval to establish its own size standard. The agency must provide SBA with copies of

public comments on the proposed rule; a justification for the intended size standards; a copy of the intended final rule; and any additional information the SBA may request as part of its review.

These procedures are more practical for the agencies to follow than the current procedures in two ways. First, they only require the SBA Administrator's approval before the agency issues its final rule adopting the contemplated size standards, rather than before it proposes them. Agencies have found submitting formal requests during the formulation of the proposed rule difficult since size standard decisions are often made shortly before publication of the rule. Second, by consulting with SBA prior to publishing a proposed rule it makes SBA aware of an agency's proposal and gives it an opportunity to advise the agency if the contemplated size standards could not be approved. An agency will be able to consider SBA's comments before publishing a proposed rule, if possible, and well in advance of a final rule.

#### Summary and Discussion of Comments to the Proposed Rule

SBA received six comments to its proposal. Four Federal agencies commented on the rule, one association, and one office within SBA. All, but one commenter, were supportive of the proposed changes to the current procedures. The comments raised several noteworthy issues. These issues are discussed below, and they lead to minor wording changes to the final rule.

A comment from a United States Commission supported the proposed regulatory revision. The Commission stated that such a change would help conserve the resources of SBA as well as those of agencies that seek approval for special size standards under this regulation. SBA can then focus on the comments the agency receives to its proposed size standards, rather than on the agency's pre-comment estimates of their appropriateness for the stated purpose. The Commission further commented that the requirement for consultation at least 14 days prior to publishing the proposed size standards should cause no undue burden on agencies in complying with this regulation.

The Commission also commented that the requirement in the proposed § 121.903(a)(6), that the requesting agency certify its compliance with the Small Business Act, is unnecessary. We agree with the Commission's observation, and we have not included that requirement in the final rule. As part of SBA's review, it will ensure that

an agency's size standard complies with the Small Business Act.

The Commission also suggested reversing the order of § 121.903(a)(5) and § 121.903(a)(6). These sections discuss the requirement to obtain the SBA Administrator's approval and what information an agency must submit. SBA recognizes that these sections are closely related and can be considered as one. Therefore, SBA has combined the requirements of the proposed § 121.903(a)(6) with § 121.903(a)(5).

A Federal agency opposed the proposed regulatory change for three reasons. First, it claimed that the change will not reduce the regulatory burden on agencies, and for some it may be more burdensome. The agency stated that the proposed revision requires more information than the existing regulation. We disagree. The new procedures essentially ask for the same information that we require under the existing regulation. The only difference is in the timing of the submission. In fact, based on past experience, we strongly believe that the existing regulation, if we do not revise it, is more burdensome on an agency than these revisions. The current regulation requires SBA to review the submitted information without the benefit of the public comments on the proposed size standard. The new procedures require only that the agency consult with SBA before it proposes the size standards, and provide SBA minimal information at that time. The agency does not have to obtain SBA approval to propose size standards. Documentation to support an agency's request for alternative size standards would be more comprehensive and logically related if the agency submits it to SBA after it has had the benefit of public comments on its proposal.

Second, the objecting agency requested that SBA clarify whether "consultation" associated with a Regulatory Flexibility Analysis in § 121.903(c) is an "informal" consultation or a formal consultation as described in the proposed § 121.903(a)(2). Section 121.903(c) refers only to the use of size standards for performing a Regulatory Flexibility Analysis (RFA). Under section 601(3) of the Regulatory Flexibility Act, an agency must use SBA's size standards for an RFA, or after consultation with the SBA's Office of Advocacy and after an opportunity for public comment, it may use different size standards. The procedures of § 121.903(a) do not apply to alternative size standards established for RFA purposes.

Third, the agency recommended that the final rule require SBA action within a reasonable time. The agency pointed

out that the proposed rule contained no timeframe within which SBA must respond, and expressed concern that SBA could "prevent indefinitely an agency from issuing a final rule." Another agency also raised this point and recommended a 21-day period for SBA to review a final rule. Under this final rule, an agency requests approval for alternate size standards only after it has gone through the proposal and comment stage at least once. SBA cannot anticipate how much time an agency will allow between the time it requests approval and when it intends to publish its final rule. Further, SBA cannot know the nature or the extent of the comments the agency will receive, or how long it may take for SBA and the agency to resolve any outstanding issues. With these unknowns, we cannot specify in a rule how long SBA will take to respond to the agency's request. Furthermore, not approving an agency's request within a stated time cannot bestow de facto approval by SBA, because the Act specifically requires the Administrator's approval before an agency can prescribe its own size standards. It goes without saying that SBA remains committed to giving priority to agency requests for approval for alternative size standards and will strive to complete its review within 30 days, if practicable, and will work with an agency to resolve issues that may prevent timely approval of size standards.

An office within SBA concurred in the proposed changes. The office noted that in the proposed § 121.903(a)(1)(ii) that SBA referred to "gross" receipts as the size standard measure for services concerns. The office expressed concern that this might confuse the meaning of 13 CFR 121.104, "How Does SBA Calculate Receipts," which does not use the term "gross," except "in the case of a sole proprietorship" (§ 121.121.104a(a)(1)). We agree, and have removed "gross" from the final version of § 121.903(a)(1)(ii).

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

The Office of Management and Budget reviewed this rule as a "significant" regulatory action under Executive Order 12866.

For purposes of the Regulatory Flexibility Act, SBA has determined that this rule does not have a significant economic effect on a substantial number of small entities. SBA has made this determination for the following reasons: (1) The change is procedural, not

substantive, in nature; (2) the change applies to Federal agencies only; and (3) the change applies only when a Federal agency contemplates categorizing an entity as a small business concern for its programs using standards other than those established by SBA. SBA has also made this determination based on the nature, number and complexity of requests from Federal agencies that have made such requests. SBA believes that this amendment will not increase the nature, number or frequency of these requests.

For purposes of Executive Order 12988, SBA has determined that this rule is drafted, to the extent possible under standards in section 3 of the Order.

For purposes of Executive Order 13132, SBA has determined that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment.

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

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

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

For reasons stated in the preamble, SBA is amending 13 CFR part 121 as follows:

#### PART 121—SMALL BUSINESS SIZE REGULATIONS

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

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

2. Section 121.902 is revised to read as follows:

##### **§ 121.902 What size standards are applicable to programs of other agencies?**

*SBA size standards.* The size standards for compliance with programs of other agencies are those for SBA programs which are most comparable to the programs of such other agencies, unless the agency and SBA agree otherwise.

3. Section 121.903 is revised to read as follows:

##### **§ 121.903 How may an agency use size standards for its programs that are different than those established by SBA?**

(a) Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size

criteria. In limited circumstances, if they decide the SBA size standard is not suitable for their programs, then agency heads may establish a more appropriate small business definition for the exclusive use in such programs, but only when:

- (1) The size standard will determine:
- (i) The size of a manufacturing concern by its average number of employees based on the preceding twelve calendar months, determined according to § 121.106;
- (ii) The size of a services concern by its average annual receipts over a period of at least three years, determined according to § 121.104;
- (iii) The size of other concerns on data over a period of at least three years; or,
- (iv) Other factors approved by SBA;
- (2) The agency has consulted in writing with SBA's Assistant Administrator for Size Standards at least fourteen (14) calendar days before publishing the proposed rule which is part of the rulemaking process. The written consultation will include:
  - (i) What size standard the agency contemplates using;
  - (ii) To what agency program it will apply;
  - (iii) How the agency arrived at this particular size standard for this program; and,
  - (iv) Why SBA's existing size standards do not satisfy the program requirements;
- (3) The agency proposes the size standard for public comment pursuant to the Administrative Procedure Act, 5 U.S.C. 553;
- (4) The agency provides a copy of the proposed rule, when it publishes it for public comment as part of the rulemaking process, to SBA's Assistant Administrator for Size Standards; and
- (5) SBA's Administrator approves the size standard before the agency adopts a final rule or otherwise prescribes the size standard for its use. The agency's request for the SBA Administrator's approval must include:
  - (i) Copies of all comments on the proposed size standard received in response to the proposed rule;
  - (ii) A separate written justification for the intended size standard;
  - (iii) A copy of the intended final rule if available at that time, or a copy of the intended final rule and preamble prior to its publication; and
  - (iv) Other information SBA may request in connection with the request.

(b) When approving any size standard established pursuant to this section, SBA's Administrator will ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the

various industries, and consider other relevant factors.

(c) Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to section 601(3) of the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA's which is more appropriate for such analysis.

4. Section 121.904 is added to read as follows:

##### **§ 121.904 When does SBA determine the size status of a business concern?**

For compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

Dated: October 16, 2001.

**Hector V. Barreto,**  
Administrator.

[FR Doc. 02-7152 Filed 3-25-02; 8:45 am]

BILLING CODE 8025-01-P

#### FEDERAL TRADE COMMISSION

##### 16 CFR Part 802

##### **Premerger Notification; Reporting and Waiting Period Requirements; Correction**

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule, correction.

**SUMMARY:** This document contains the correction to the premerger notification final rule which was published Monday, March 18, 2002, (67 FR 11898). This document corrects a paragraph reference that appears in an example to § 802.51.

**EFFECTIVE DATE:** April 17, 2002.

##### **FOR FURTHER INFORMATION CONTACT:**

Marian R. Bruno, Assistant Director, Karen E. Berg, Attorney, or B. Michael Verne, Compliance Specialist, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Telephone: (202) 326-3100.

**SUPPLEMENTARY INFORMATION:** The final rule, as published, contained an error in the paragraph referenced in the examples to section 802.51.

Accordingly, the final rule for 16 CFR part 802, published in the **Federal Register** on March 18, 2002, is corrected as follows:

##### **§ 802.51 [Corrected]**

On page 11904, in § 802.51, in example 3, in the third column, in the