

section if it meets the criteria of either paragraph (b)(1) or paragraph (b)(2) of this section:

(1) It received, for the three most recent fiscal years, no monies directly from patients with incomes up to double the current poverty line issued by the Secretary pursuant to 42 U.S.C. 9902, exclusive of amounts charged or received for purposes of claiming reimbursement under third party insurance or governmental programs, such as Medicaid or Medicare deductible or coinsurance amounts; or

(2)(i) It received, for the three most recent fiscal years, at least 10 percent of its total operating revenue (net patient revenue plus other operating revenue, exclusive of any amounts received, or if not received, claimed, as reimbursement under titles XVIII and XIX of the Social Security Act) from philanthropic sources to cover operating deficits attributable to the provision of discounted services. Philanthropic sources include private trusts, foundations, churches, charitable organizations, state and/or local funding, and individual donors; and either—

(ii) (A) Provides health services without charge or at a substantially reduced rate (exclusive of amounts charged or received for purposes of claiming reimbursement under third party insurance or governmental programs, such as Medicaid or Medicare deductible or coinsurance amounts) to persons who are determined by the facility to qualify therefor under a program of discounted health services. A "program of discounted health services" must provide for financial and other objective eligibility criteria and procedures, including notice prior to nonemergency service, that assure effective opportunity for all persons to apply for and obtain a determination of eligibility for such services including a determination prior to service where requested; or

(B) Makes all services of the facility available to all persons at no more than a nominal charge, exclusive of amounts charged or received for purposes of claiming reimbursement under third party insurance or governmental programs, such as Medicaid or Medicare deductible or coinsurance amounts.

(c) *Procedures for certification.* To be certified under this section, a facility must submit to the Secretary, in addition to other materials that the Secretary may from time to time require, copies of the following:

(1) Audited financial statements for the three most recent fiscal years or other documents prescribed by the Secretary, sufficient to show that the

facility meets the criteria of paragraph (b)(1) or (b)(2) of this section.

(2)(i) Where the facility claims qualification under paragraph (b)(2)(ii)(A) of this section, a complete description, and documentation where requested, of its program of discounted health services, including charging and collection policies of the facility, and eligibility criteria and notice and determination procedures used under its program(s) of discounted health services.

(ii) Where the facility claims qualification under paragraph (b)(1) or paragraph (b)(2)(ii)(B) of this section, a complete description, and documentation where requested, of its admission, charging, and collection policies.

(d) *Period of effectiveness.* (1) A certification by the Secretary under this section remains in effect until withdrawn. The Secretary may disallow credit under this subpart when the Secretary determines that there has been a material change in any factor upon which certification was based or substantial noncompliance with this subpart. The Secretary may withdraw certification where the change or noncompliance has not been in the Secretary's judgment adequately remedied or otherwise continues.

(2) *Deficits.*—(1) *Title VI-assisted facilities with assessed deficits.* Where a facility assisted under title VI of the Act has been assessed as having a deficit under § 124.503(b) that has not been made up prior to certification under this section, the facility may make up that deficit by either—

(A) Demonstrating to the Secretary's satisfaction that it met the applicable requirements of paragraph (b) of this section for each year in which a deficit was assessed; or

(B) Providing an additional period of service under this section on the basis of one year (or portion of a year) of certification for each year (or portion of a year) of deficit assessed. The period of obligation applicable to the facility under § 124.501(b) shall be extended until the deficit is made up in accordance with the preceding sentence.

(ii) Where any period of compliance under this subpart of a facility assisted under title VI of the Act has not been assessed, the facility will be presumed to have no allowable credit for such period. The facility may either—

(A) Make up such deficit in accordance with paragraph (d)(2)(i) of this section; or

(B) Submit an independent certified audit, conducted in accordance with procedures specified by the Secretary, of the facility's records maintained

pursuant to § 124.510. If the audit establishes to the Secretary's satisfaction that no, or a lesser, deficit exists for the period in question, the facility will receive credit for the period so justified. Any deficit which the Secretary determines still remains must be made up in accordance with paragraph (d)(2)(i) of this section.

(iii) *Title XVI-assisted facilities.* (A) A facility assisted under title XVI of the Act which has an assessed deficit which was not made up prior to certification under this section shall make up that deficit in accordance with paragraph (d)(2)(i)(A) of this section. If it cannot make the showing required by that paragraph, it shall make up the deficit when its certification under this section is withdrawn.

(B) A facility assisted under title XVI of the Act whose compliance with this subpart has not been completely assessed will be presumed to have no allowable credit for the unassessed period. The facility may make up the deficit by—

(1) Following the procedure of paragraph (d)(2)(iii)(A) of this section; or

(2) Submitting an independent certified audit, conducted in accordance with procedures specified by the Secretary, of the facility's records maintained pursuant to § 124.510. If the audit establishes that no, or a lesser, deficit exists for the period in question, the facility will receive credit for the period so justified. Any deficit which the Secretary determines still remains must be made up in accordance with paragraph (d)(2)(iii)(A) of this section.

[FR Doc. 94-21354 Filed 8-29-94; 8:45 am]
BILLING CODE 4160-15-M

FEDERAL MARITIME COMMISSION 46 CFR Part 501

Organization, Functions, and Authority Delegations: Administration Bureau, Director

AGENCY: Federal Maritime Commission.
ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is expanding its delegation of authority to the Director, Bureau of Administration with respect to accounting systems and the collection of user fees charged for the Automated Tariff Filing and Information System.

EFFECTIVE DATE: August 30, 1994.

FOR FURTHER INFORMATION CONTACT:
Joseph C. Polking, Secretary, Federal Maritime Commission, 800 N. Capitol

St., N.W., Washington, D.C. 20573. (202) 523-5725.

SUPPLEMENTARY INFORMATION: The Federal Maritime Commission is amending Part 501 of Title 46 of the Code of Federal Regulations to delegate to the Director, Bureau of Administration, the authority to deny access to Automated Tariff Filing and Information System (ATFI) data tapes for failure to operate under an approved accounting or charging system or for failure to remit user fees to the Commission. Notice and public procedure are not necessary prior to the revision of delegated authority. Neither is a delayed effective date required. 5 U.S.C. 553.

List of Subjects in 46 CFR Part 501

Administrative practice and procedure; Authority delegations; Organization and functions; Seals and insignia.

Part 501 of Title 46 of the Code of Federal Regulations is amended as follows:

PART 501—[AMENDED].

1. The authority citation for Part 501 continues to read as follows:

Authority: 5 U.S.C. 551-557, 701-706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501-520 and 3501-3520; 46 U.S.C. app. 801-848, 876, 1111 and 1701-1720; Reorganization Plan No. 7 of 1961, 26 FR 7315, August 12, 1961; Pub. L. 89-56, 79 Stat. 195; and 5 CFR Part 2638.

2. Section 501.30 is amended by revising paragraph (b)(1) as follows:

§ 501.30 Delegation to and redelegation by Director, Bureau of Administration

(b)(1) Authority under § 514.21(m)(2) of this chapter, after consultation with the Bureau of Tariffs, Certification and Licensing and the Office of the Managing Director, to evaluate and approve or disapprove by letter the accounting or charging system the applicant intends to use for charging users and remitting to the Commission indirect (subsequent) access user fees under 46 U.S.C. app. 1107a(d)(1)(B)(ii), and by letter to deny access to ATFI data tapes for failure to operate under an approved accounting or charging system or for failure to remit user fees to the Commission.

By the Commission.

Joseph C. Polking,
Secretary.

[FR Doc. 94-21303 Filed 8-29-94; 8:45 am]

BILLING CODE 6730-01-M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1002

[Ex Parte No. 246 (Sub-No. 12)]

Regulations Governing Fees for Services Performed in Connection With Licensing and Related Services—1994 Update

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts its 1994 User Fee Update and revises its fee schedule in compliance with the regulatory requirement that its fees be updated annually. The fee policy changes also are adopted to improve the Commission's user fee program.

EFFECTIVE DATE: These rules are effective on October 1, 1994.

FOR FURTHER INFORMATION CONTACT: Kathleen M. King, (202) 927-5493, or for costing questions David T. Groves, (202) (927-6395), or John C. Pertino, (202) 927-6229. [TDD for hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: The Commission's 1994 User Fee Update is adopted substantially as proposed in our notice of proposed rulemaking published at 59 FR 29586 (June 8, 1994). However, due to recent Congressional action concerning tariff filings and the delay in implementing optical imaging for tariff filings, Fee Item (74)(i) relating to the filing of tariffs, rates schedules, and contract and/or contract summaries including supplements, is set at \$13 rather than \$15.

Also, the description of Fee Item (85) involving valuation of railroad lines in conjunction with purchase offers is being revised to clarify that the fee applies to offers to subsidize a rail line.

The Commission concludes that the fee changes adopted here will not have a significant economic impact on a substantial number of small entities because the Commission's regulations provide for waiver of filing fees for those entities which can make the required showing of financial hardship. In addition, the fee policy changes adopted here will not have a significant economic impact on a substantial number of small entities because those changes only involve minor revisions of the Commission's user fee policy.

Additional information is contained in the Commission's decision. To obtain a copy of the full decision, write, call, or pick up in person from Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building,

Washington, DC 20423. Telephone: (202) 289-4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927-5721.]

List of Subjects in 49 CFR Part 1002

Administrative practice and procedure, Common carriers, Freedom of information, User fees.

Decided: August 16, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Morgan. Commissioner Simmons dissented in part with a separate expression.

Vernon A. Williams,
Acting Secretary.

For the reasons set forth in the preamble, title 49, chapter X, part 1002, of the Code of Federal Regulations is amended as follows:

PART 1002—FEES

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A), 5 U.S.C. 553, 31 U.S.C. 9701 and 49 U.S.C. 10321.

2. Section 1002.1 is amended by revising paragraphs (a), (b), (c), (d), and (e)(1) and the chart in paragraph (f)(6) to read as follows:

§ 1002.1 Fees for records search, review, copying, certification, and related services.

- (a) Certificate of the Secretary, \$9.00.
- (b) Service involved in examination of tariffs or schedules for preparation of certified copies of tariffs or schedules or extracts therefrom at the rate of \$23.00 per hour.
- (c) Service involved in checking records to be certified to determine authenticity, including clerical work etc., incidental thereto, at the rate of \$16.00 per hour.
- (d) Electrostatic copies of tariffs, reports, and other public documents, at the rate of \$.70 per letter size or legal size exposure. A minimum charge of \$5.00 will be made for this service.
- (e) * * *
- (1) A fee of \$38.00 per hour for professional staff time will be charged when it is required to fulfill a request for ADP data.
- * * *
- (f) * * *
- (6) * * *

Grade	Rate	Grade	Rate
GS-1	\$6.74	GS-9	\$15.73
GS-2	7.33	GS-10	17.32
GS-3	8.27	GS-11	19.03
GS-4	9.28	GS-12	22.81
GS-5	10.38	GS-13	27.12
GS-6	11.57	GS-14	32.05

Grade	Rate	Grade	Rate
GS-7	12.86	GS-15 and	37.70
GS-8	14.24	Over	

* * * * *

3. Section 1002.2 is amended by revising paragraphs (a)(3) and (f) to read as follows:

§ 1002.2 Filing fees.

(a) * * *

(3) Fees will be payable to the Interstate Commerce Commission by a

check payable in United States currency drawn upon funds deposited in a United States or foreign bank or other financial institution, money order payable in United States' currency, or credit card (VISA or MASTERCARD).

* * * * *
(f) *Schedule of filing fees.*

Type of proceeding	Fee
Part I: Non-Rail Applications for Operating Authority or Exemptions:	
(1) An application for motor carrier operating authority; a certificate of registration including a certificate of registration for certain foreign carriers; broker authority; water carrier operating or exemption authority; or household goods freight forwarder authority	\$300
(2) A fitness-only application for motor common carrier authority under 49 U.S.C. 10922(b)(4)(E) or motor contract authority under 49 U.S.C. 10923(b)(5)(A) to transport food and related products	150
(3) A petition to interpret or clarify an operating authority under 49 CFR 1160.66	2,800
(4) A request seeking the modification of operating authority only to the extent of making a ministerial correction, when the original error was caused by applicant, a change in the name of the shipper or owner of a plant site, or the change of a highway name or number	50
(5) A petition to renew authority to transport explosives under 49 U.S.C. 10922 or 10923	200
(6) An application to remove restriction or broaden unduly narrow authority	300
(7) An application for authority to deviate from authorized regular-route authority	150
(8) An application for motor carrier or water carrier temporary authority under 49 U.S.C. 10928	100
(9) An application for motor carrier emergency temporary authority under 49 U.S.C. 10928(c)(1)	100
(10) An extension of the time period during which an outstanding application for temporary or emergency temporary authority as defined in 49 U.S.C. 10928 may continue	26
(11) Request for name change of carrier, broker, or household goods freight forwarder	13
(12) A notice required by 49 U.S.C. 10524(b) to engage in compensated intercorporate hauling including an updated notice required by 49 CFR 1167.3	150
(13) A notice of intent to operate under the agricultural co-operative exemption in 49 U.S.C. 10526(a)(5)	70
(14) [Reserved]	
(15) A joint petition to substitute applicant in a pending operating rights proceeding	30
(16) [Reserved]	
Part II: Non-Rail Proceedings to Discontinue Transportation:	
(17) A notice or petition to discontinue ferry service under 49 U.S.C. 10908	11,900
(18) A petition to discontinue motor carrier of passenger transportation in one state	1,000
(19) [Reserved]	
Part III: Non-Rail Applications or Proceedings to Enter Upon a Particular Financial Transaction or Joint Arrangement:	
(20) An application for the pooling or division of traffic	2,300
(21) An application involving the purchase, lease, consolidation, merger, or acquisition of control of a motor or water carrier or carriers under 49 U.S.C. 11343	1,100
(22) An application for approval of a non-rail rate association agreement. 49 U.S.C. 10706	14,500
(23) An application for approval of an amendment to a non-rail rate association agreement	
(i) Significant amendment	2,400
(ii) Minor amendment	50
(24) An application for temporary authority to operate a motor or water carrier. 49 U.S.C. 11349	250
(25) An application to transfer or lease a certificate or permit, including a certificate of registration, and a broker's license under 49 U.S.C. 10926, or a transfer of a water carrier exemption authorized under 49 U.S.C. 10542 and 10544	300
(26) [Reserved]	
(27) A petition for exemption under 49 U.S.C. 11343(e)	300
(28)-(32) [Reserved]	
Part IV: Rail Licensing Proceedings other than Abandonment or Discontinuance Proceedings:	
(33)	
(i) An application for a certificate authorizing the construction, extension, acquisition, or operation of lines of railroad. 49 U.S.C. 10901	3,800
(ii) Notice of exemption under 49 CFR 1150.31-1150.35	950
(iii) Petition for exemption under 49 U.S.C. 10505	3,000
(34) A Feeder Line Development Program application filed under 49 U.S.C. 10910(b)(1)(A)(i)	4,600
(35) A Feeder Line Development Program application filed under 49 U.S.C. 10910(b)(1)(A)(ii)	2,600
(36)-(37) [Reserved]	
Part V: Rail Abandonment or Discontinuance of Transportation Services Proceedings:	
(38)	
(i) An application for authority to abandon all or a portion of a line of railroad or discontinue operation thereof filed by a railroad (except applications filed by Consolidated Rail Corporation pursuant to the North East Rail Service Act [Subtitle E of Title XI of Pub. L. 97-35], bankrupt railroads, or exempt abandonments under 49 CFR 1152.50)	11,600
(ii) Notice of an exempt abandonments or discontinuances under 49 CFR 1152.50	1,900
(iii) A petition for exemption under 49 U.S.C. 10505	3,300
(39) An application for authority to abandon all or a portion of a line of railroad or operation thereof filed by Consolidated Rail Corporation pursuant to North East Rail Service Act	250
(40) Abandonments filed by bankrupt railroads. 49 CFR 1152.40	950
(41) [Reserved]	
(42) A notice or petition to discontinue passenger train service	11,800

Type of proceeding	Fee
(43) [Reserved]	
Part VI: Rail Applications to Enter Upon a Particular Financial Transaction or Joint Arrangement:	
(44) An application for use of terminal facilities or other applications under 49 U.S.C. 11103	9,900
(45) An application for the pooling or division of traffic. 49 U.S.C. 11342	5,400
(46) An application for two or more carriers to consolidate or merge their properties or franchises (or a part thereof) into one corporation for ownership, management, and operation of the properties previously in separate ownership. 49 U.S.C. 11343	
(i) Major transaction	195,200
(ii) Significant transaction	39,000
(iii) Minor transaction	3,200
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	900
(v) Responsive application	3,200
(vi) Petition for exemption under 49 U.S.C. 10505	3,625
(47) An application of a non-carrier to acquire control of two or more carriers through ownership of stock or otherwise. 49 U.S.C. 11343	
(i) Major transaction	195,200
(ii) Significant transaction	39,000
(iii) Minor transaction	3,200
(iv) A notice of an exempt transaction under 49 CFR 1180.2(d)	700
(v) Responsive application	3,200
(vi) Petition for exemption under 49 U.S.C. 10505	3,625
(48) An application to acquire trackage rights over, joint ownership in, or joint use of any railroad lines owned and operated by any other carrier and terminals incidental thereto. 49 U.S.C. 11343	
(i) Major transaction	195,200
(ii) Significant transaction	39,000
(iii) Minor transaction	3,200
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	650
(v) Responsive application	3,200
(vi) Petition for exemption under 49 U.S.C. 10505	3,625
(49) An application of a carrier or carriers to purchase, lease or contract to operate the properties of another, or to acquire control of another by purchase of stock or otherwise. 49 U.S.C. 11343	
(i) Major transaction	195,200
(ii) Significant transaction	39,000
(iii) Minor transaction	3,200
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	750
(v) Responsive application	3,200
(vi) Petition for exemption under 49 U.S.C. 10505	3,625
(50) An application for a determination of fact of competition. 49 U.S.C. 11321(a)(2) or (b)	39,000
(51) An application for approval of a rail rate association agreement. 49 U.S.C. 10706	36,700
(52) An application for approval of an amendment to a rail rate association agreement. 49 U.S.C. 10706	
(i) Significant amendment	6,800
(ii) Minor amendment	50
(53) An application for authority to hold a position as officer or director. 49 U.S.C. 11322	400
(54)	
(i) An application to issue securities; an application to assume obligation or liability in respect to securities of another; an application or petition for modification of an outstanding authorization; or an application for competitive bidding requirements of Ex Parte No. 158, under 49 CFR part 1175 and 49 U.S.C. 11301	1,700
(ii) Notice of an exempt transaction under 49 CFR part 1175	150
(55) A petition for exemption under 49 U.S.C. 10505 (other than a rulemaking) filed by rail carriers not otherwise covered	1,625
(56)-(59) [Reserved]	
Part VII: Formal Proceedings:	
(60) A complaint alleging unlawful rates or practices of carriers, property brokers, or freight forwarders of household goods	1,000
(61) A complaint seeking or a petition requesting institution of an investigation seeking the prescription or division of joint rates, fares, or charges. 49 U.S.C. 10705(f)(1)(A)	4,600
(62) A petition for declaratory order:	
(i) A petition for declaratory order involving dispute over an existing rate or practice which is comparable to a complaint proceeding	1,000
(ii) All other petitions for declaratory order	1,300
(63) Requests for nationwide and regional collectively filed general rate increases and major rate restructures accompanied by supporting cost and financial information justifying the increases	8,100
(64) A petition for exemption from filing tariffs by bus carriers	250
(65) An application for shipper antitrust immunity. 49 U.S.C. 10706(a)(5)(A)	3,700
(66) Petition for review of state regulation of intrastate rates, rules, or practices filed by interstate rail carriers. 49 U.S.C. 11501	1,000
(67) Petition for review of state regulation of intrastate rates, rules, or practices filed by interstate bus carriers. 49 U.S.C. 11501	2,300
(68)-(71) [Reserved]	
Part VIII: Informal Proceedings:	
(72) An application for authority to establish released value rates or ratings under 49 U.S.C. 10730 (except that no fee will be assessed for applications seeking such authority in connection with reduced rates established to relieve distress caused by drought or other natural disaster)	650
(73) An application for special permission for short notice or the waiver of other tariff publishing requirements	60
(74)	
(i) The filing of tariffs, rate schedules, contracts, and/or contract summaries, including supplements	113
(ii) Tariffs transmitted by fax	21

Type of proceeding	Fee
(75)	
(i) Special docket applications from rail and water carriers (involving sums of more than \$25,000)	80
(ii) Special docket application involving sums of \$25,000 or less	40
(76) Informal complaint about rail rate application	300
(77)	
(i) An application for original qualification as self-insurer for bodily injury and property damage insurance (BI&PD)	3,900
(ii) An application for original qualification as self-insurer for cargo insurance	400
(78) A service fee for insurer, surety, or self-insurer accepted certificate of insurance, surety bond, or other instrument submitted in lieu of a broker surety bond	³ 10
(79) A petition for waiver of any provision of the lease and interchange regulations, 49 CFR Part 1057	400
(80) A petition for reinstatement of revoked operating authority	70
(81)-(82) [Reserved]	
(83) Petition for reinstatement of dismissed operating rights application	400
(84) Filing of documents for recordation, 49 U.S.C. 11303 and 49 CFR 1177.3(c)	⁴ 21
(85) Valuations of railroad lines in conjunction with purchase offers or subsidies in abandonment proceedings	1,500
(86) Information opinions about rate applications (all modes)	50
(87)	
(i) A railroad accounting interpretation	600
(ii) A motor carrier accounting interpretation	150
(88) An operational interpretation	750
(89)-(95) [Reserved]	
Part IX: Services:	
(96) Messenger delivery of decision to a railroad carrier's Washington, DC, agent	⁵ 16
(97) Request for service or pleading list for proceedings	⁶ 12
(98) Request for copies of the 1% carload waybill sample	150
(99) Verification of surcharge level pursuant to Ex Parte No. 389, Procedures for Requesting Rail Variable Cost & Revenue Determination for Joint Rates Subject to Surcharge or Cancellation	722
(100)	
(i) Application fee for Interstate Commerce Commission Practitioners' Exam	100
(ii) Practitioners' Exam Information Package	25
(101) Uniform Railroad Cost System (URCS) software and information	
(i) Initial PC version URCS Phase III software program and manual	25
(ii) Updated URCS PC version Phase III cost file, if diskette provided by requestor	5
(iii) Updated URCS PC version Phase III cost file, if diskette provided by the Commission	10
(iv) Public requests for Source Codes to the PC version URCS Phase III	500
(v) PC version or mainframe version URCS Phase II	200
(vi) PC version or mainframe version Updated Phase II databases	25
(vii) Public requests for Source Codes to PC version URCS Phase II	1,000
(102) Faxed copies of operating authority to applicants or their representatives who did not receive a served copy	5

¹ Per series transmitted.² Per page.³ Per accepted certificate or other instrument in lieu of a broker surety bond.⁴ Per document.⁵ Per delivery.⁶ Per list.⁷ Per movement verified.

4. Section 1002.3 is amended by revising paragraph (a) to read as follows:

§ 1002.3 Updating user fees.

(a) *Update.* Each fee established in this part shall be updated in accordance with this section at least once a year. However, any fee may be updated more than once a year, if the Commission finds that an additional update is necessary.

[FR Doc. 94-21336 Filed 8-29-94; 8:45 am]

BILLING CODE 7035-01-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 678

[Docket No. 920409-3047; I.D. 082294C]

Atlantic Shark Fisheries; Large Coastal Sharks

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Rescission of closure; closure.

SUMMARY: NMFS rescinds the closure of the fishery for large coastal sharks conducted in the Atlantic Ocean, Gulf of Mexico and Caribbean Sea. Rescission of the closure of this fishery is necessary because new information indicates that the second semiannual quota for large

coastal sharks has not been taken. Based on revised estimates of landings and projected catches, a new closure date is established.

EFFECTIVE DATE: The closure of August 10, 1994, is rescinded effective at 0000 hours, local time, September 1, 1994. The fishery for large coastal sharks is reopened effective 0001 hours local time September 1, 1994, through October 10, 1994. The closure will be effective from 0001 hours, local time, October 11, 1994, through December 31, 1994.

FOR FURTHER INFORMATION CONTACT: C. Michael Bailey, 301-713-2347; Michael Justen, 813-570-5305; or Kevin B. Foster, 508-281-9260.

SUPPLEMENTARY INFORMATION: The Atlantic shark fishery is managed by the Secretary of Commerce according to the Fishery Management Plan (FMP) for Atlantic Sharks under authority of the

Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR part 678.

Section 678.23(b)(3) of the regulations provides for two semiannual quotas of large coastal sharks to be harvested in or from the Western North Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea, by owners or operators of vessels permitted under § 678.4. The adjusted second semiannual quota of 1,318 metric tons (mt) is available for harvest from July 1 through December 31, 1994.

The Assistant Administrator for Fisheries, NOAA (AA), is required under § 678.24 to monitor the catch and landing statistics and, on the basis of these statistics, to determine when the catch of sharks in or from the Western North Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea, will equal any quota under § 678.23(b). When shark harvests reach, or are projected to reach, a quota established under § 678.23(b), the AA is further required under § 678.24 to close the fishery.

The AA had determined, based on the best available data on reported catch and projections of future landings, that the semiannual quota for large coastal sharks in or from the Western North Atlantic Ocean, including the Gulf of

Mexico and Caribbean Sea, for the period July 1 through December 31, 1994, would be attained by August 10, 1994. Therefore, a closure notice was published in the *Federal Register* on August 1, 1994 (59 FR 38943), to take effect August 10, 1994.

Upon further analysis of the landings data, including new information that became available since announcement of the closure date, the AA has determined that 656.95 mt of the 1,318 mt quota for the large coastal shark fishery remain unharvested. Therefore, the closure of August 10, 1994, is rescinded effective September 1, to allow an opportunity for shark fishermen to take their full allocation. The effective date of rescission has been established at September 1, 1994, in response to industry's request for sufficient advance notice of the reopening of the large coastal shark fishery.

The daily landing rates obtained from the revised estimates indicate that the remaining quota in the large coastal shark fishery could be harvested within 40 days. Therefore, it is projected that the available quota will be taken by October 10, 1994, and for vessels issued a permit under § 678.4, possession of large coastal sharks from the management unit will be prohibited as of 0001 hours on October 11, 1994. The

AA is announcing this closure date in advance in response to industry's request for sufficient advance notice of the closure of the large coastal shark fishery.

During the closure, for vessels issued a permit under § 678.4, possession of large coastal sharks from the management unit is prohibited, unless the vessel is operating as a charter vessel or headboat, in which case the vessel limit per trip is four large coastal sharks. However, the sale, purchase, trade, or barter or attempted sale, purchase, trade, or barter of carcasses and/or fins of large coastal sharks harvested by a person aboard a vessel that has been issued a permit under § 678.4 is prohibited, except for those that were harvested, off-loaded, and sold, traded, or bartered prior to October 10, 1994, and were held in storage by a dealer or processor.

Classification

This action is taken under 50 CFR part 678 and is exempt from OMB review under E.O. 12866.

Dated: August 24, 1994.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

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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.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1210

RIN: 0581-AB21

[FV-93-706PR-A]

Watermelon Research and Promotion Plan; Proposed Amendments to the Plan, Rules and Regulations, and Rules of Practice for Petitions; Order Directing That a Referendum be Conducted

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This proposed rule would amend the Watermelon Research and Promotion Plan (Plan) to exempt from assessments producers with less than 10 acres of watermelons rather than 5 acres and importers of less than 150,000 pounds, cover all 50 States by the Plan, and revise the criteria for determining the eligibility of producers to serve on the Board. In addition, conforming changes would be made to the rules and regulations issued under the Plan and the rules of practice for petitions. Furthermore, the Department is announcing that a referendum will be conducted among eligible producers, handlers, and importers to determine whether they favor the elimination of refunds of assessments and (2) whether they favor the assessment of watermelon imports and the addition of importer members to the National Watermelon Promotion Board (Board).

DATES: In order to be eligible to vote, watermelon producers, handlers, and importers must have produced, handled or imported watermelons during the period from January 1, 1993, to December 31, 1993 (representative period). The referendum will be conducted from November 1 through November 30, 1994.

FOR FURTHER INFORMATION CONTACT: Sonia N. Jimenez, Research and

Promotion Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2535-S, Washington, DC 20090-6456; telephone (202) 720-9916.

SUPPLEMENTARY INFORMATION: This proposed rule would amend the Watermelon Research and Promotion Plan [7 CFR 1210], hereinafter referred to as the Plan. The Plan is effective under the Watermelon Research and Promotion Act, as amended by the Watermelon Research and Promotion Improvement Act of 1993 [7 U.S.C. 4901-4916], hereinafter referred to as the Act.

This rule has been determined to be not significant for the purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under § 1650 of the Act, a person subject to the Plan may file a petition with the Secretary stating that the Plan or any provision of the Plan, or any obligation imposed in connection with the Plan, is not in accordance with law and requesting a modification of the Plan or an exemption from the Plan. The petitioner is afforded the opportunity for a hearing on the petition. After such hearing, the Secretary will make a ruling on the petition. The Act provides that the district courts of the United States in any district in which a person who is a petitioner resides or carries on business are vested with jurisdiction to review the Secretary's ruling on the petition, if a complaint for that purpose is filed within 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order

that small businesses will not be unduly or disproportionately burdened.

There are approximately 750 watermelon handlers and 5,000 watermelon producers in the contiguous 48 States of the United States who are subject to the Plan. There are approximately 140 importers of watermelons. Small agricultural service firms are defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than \$5 million and small agricultural producers are defined as those having annual receipts of less than \$500,000. The majority of watermelon handlers, producers, and importers may be classified as small entities.

The changes in the Plan, rules and regulations, and rules of practice for petitions reflect amendments to the Act. The overall economic impact of these proposed changes is not expected to be significant. Including all 50 States and the District of Columbia under the Plan will have little impact. The producer exemption from assessments would be increased from 5 acres to 10 acres. This change would benefit small producers because it would increase the exemption level, and small producers would not have to pay the assessment. The eligibility criteria for determining if a person is a handler or a producer would not have any economic impact. The elimination of refunds may have some impact on a small amount of producers and handlers who are currently entitled to refunds. There will also be a new burden on importers caused by the assessment of imports, but importers are currently benefiting from the activities which promote watermelons without paying assessments. The research and promotion program is expected to continue to benefit producers, handlers, and importers subject to the Plan by expanding and maintaining new and existing markets. Accordingly, the Administrator of AMS has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction

In accordance with the Paperwork Reduction Act of 1980 [40 U.S.C. chapter 35], the information collection requirements contained in the Plan have previously been approved by the Office of Management and Budget (OMB) and

assigned OMB number 0581-0093. There would be a new reporting burden on importers but the burden has been already approved by the OMB and assigned OMB control number 0581-0093. This action adds no additional reporting burden. It has been estimated that it will take an average of 10 minutes for each producer, handler, and importer of watermelons to participate in the voluntary referendum balloting.

Background

Under the Plan, the National Watermelon Promotion Board (Board) administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon's position in the market place and to establish, maintain, and expand markets for domestic watermelons. This program is financed by assessments on all producers, except those persons engaged in the growing of less than five acres of watermelons, and handlers of watermelons. The Plan specifies that handlers are responsible for collecting and submitting both the producer and handler assessments to the Board, reporting their handling of watermelons, and maintaining records necessary to verify their reporting.

U.S. production of watermelons is estimated through the use of U.S. shipment statistics. Shipments of U.S.-produced watermelons totaled about 1,895.6 million pounds in 1993, 7 percent less than in 1992. Imports of watermelons in 1993 totaled 343.5 million pounds, an increase of 12 percent. Therefore, domestic production is about six times as great as the volume of imports.

A proposed rule was published in the Federal Register on April 14, 1994 [59 FR 17739]. The rule published in April contained the proposed amendments to the Plan, rules and regulations, rules of practice for petitions, and referendum procedures. In order to have the referendum procedures in place for the referendum, the Department decided to separately make final the referendum procedures. Therefore, this proposed rule contains the proposed amendments to the Plan, rules and regulations, and rules of practice for petitions. A final rule published separately in this issue of the Federal Register contains the referendum procedures which will be used in the referendum.

The deadline for comments on the proposed amendments published on April 14 was May 16, 1994. Twenty-one comments were received.

Eighteen comments related to this proposed rule. Sixteen commenters stated their support of the proposed

amendments to the Plan. They stated that per capita consumption of watermelons is on the increase again and that the National Watermelon Promotion Board (Board) has achieved many successes.

Two commenters stated that they are not in favor of the Plan and that they were not aware that a refund provision was available.

A referendum was conducted in 1989 to determine if majority of watermelon growers and handlers favored the passage of an industry funded research and promotion program for watermelons. The Plan is intended to collect assessments for research and promotion of watermelons. Currently, any individual not favoring the program can request a refund of the assessments paid by that individual. Procedures to request a refund of assessments are explained in the Plan.

The amendments to the Act authorize an assessment on watermelons imported into the United States by importers, and the addition of importer members to the Board if approved by watermelon producers, handlers, and importers in a referendum. Watermelon imports enter the country primarily during the winter season. Imports of watermelons in 1993 totalled 343.5 million pounds. The assessment rate for imports would be the combined total assessment rate paid by producers and handlers of domestic watermelons. The current assessment rate for producers is 2 cents per hundredweight and for handlers is 2 cents per hundredweight. The combined assessment rate for importers, therefore, would be 4 cents per hundredweight. Assessments will be paid at the time the watermelons enter the country. The collection of assessments on imported watermelons will be expected to generate an additional \$137,400 per year in revenue to the Board. In order to make these changes, this rule will amend §§ 1210.305, 1210.320, 1210.321, 1210.328, 1210.341, 1210.350, 1210.351, 1210.352, 1210.363, and 1210.364 of the Plan; §§ 1210.402 and 1210.405 of the nomination procedures; and §§ 1210.515, 1210.518, 1210.519, 1210.521, 1210.530, 1210.531, and 1210.532 of the rules and regulations. In addition, a new § 1210.314 will be added to the Plan.

To facilitate the collection of assessments on imported watermelons, the Secretary proposes that the United States Customs Service of the Department of the Treasury be designated as the collecting agency for assessments levied on such imports. Other commodity research and promotion programs utilize the Customs Service as a means of collecting

assessments on imported products, and the Customs Service is agreeable to collecting these watermelon assessments. An agreement between the USDA and the Customs Service would be entered into to implement this action. In order to make this changes, this rule would amend § 1210.518 of the Rules and Regulations.

The importer representation on the Board would be proportionate to the percentage of assessments paid by importers to the Board, except that at least one representative of importers would serve on the Board if importers are subject to the Plan. This representation would enable importers to participate in developing the Board's programs, plans, and projects, and express their views and concerns on how Board funds are used if imports are assessed under the Plan. Importers would nominate individuals to serve as importer members on the Board, and as required for other members of the Board, two nominees would be submitted to the Secretary for each vacancy. The Act requires the number of importers members to be proportionate to the assessments paid by importers. However, it is necessary to calculate the number of initial importer members on the volume of imports because imports are not currently being assessed. There are currently 14 producers and 14 handlers on the Board. This is the equivalent of one domestic industry member for every 67.7 million pounds of domestic production. Based on the average annual volume of imports during the last 3-year period (323.1 hundredweight), four importers would be added to the current Board. In order to make this change, this rule would amend §§ 1210.320, 1210.321, and 1210.401.

The Act provides for the elimination of refunds of assessments if the producers, handlers, and importers vote to eliminate refunds. The refund provision has been in effect since the beginning of the program. Refunds have been increasing every year from 9 percent in 1990 to almost 29 percent in 1993. If the refund provision is eliminated, it would provide the Board with an estimated additional \$250,000 per year for research and promotion activities. In order to make this change, this rule would amend §§ 1210.343 and 1210.520.

If the refund provision remains in the Plan, and importers are subject to the Plan, then importers would be entitled to a refund of all assessments paid on watermelons imported into the United States.

The Act increases the acreage for exempt producers from "less than 5

acres" to "less than 10 acres" of watermelons. Importers of less than 150,000 pounds of watermelons per year would be entitled to apply for a refund which would be the producer equivalent of the import assessments. The 150,000-pound exemption level for importers is the level determined to be equivalent to 10 acres of watermelons for domestic producers. In addition, the Act provides that the Board has the authority to establish rules for producers to certify whether they are exempt from the assessments. In order to make these changes, this rule would amend §§ 1210.341, 1210.342, 1210.518, and 1210.521.

The Act also increases applicability of the law from the 48 contiguous States to the 50 States and the District of Columbia. This amendment would expand the Plan to cover producers, handlers, and importers in Hawaii, Alaska, and the District of Columbia. In order to make these changes, this rule would amend § 1210.305 and would add a new § 1210.315.

Section 1647(f) of the Act permits changes in the assessment rate through notice and comment rulemaking. No change to the Plan is necessary to implement this amendment to the Act because § 1210.341 of the Plan states that assessment rates shall be fixed by the Secretary in accordance with section 1647(f) of the Act.

The Act provides that a producer is eligible to serve on the Board as a representative of handlers (1) if a producer purchases watermelons from other producers in a combined total volume that is equal to 25 percent or more of the producer's own production or (2) if the combined total volume of watermelons handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production. This provision facilitates the eligibility of producers and handlers to serve on the Board as representatives of their specific group. In order to make these changes, this rule would amend §§ 1210.321, 1210.363, 1210.368, and 1210.402.

The Act also provides that all future promulgation and amendment referenda do not have to be conducted at Extension Service county offices. This procedure proved to be expensive and difficult to administer. The Act would now allow referenda to be conducted by mail ballot which would reduce the costs involved in conducting referenda and facilitate a more timely tabulation of the results. In order to make this change, this rule would amend § 1210.363.

In addition, the Act changes the criteria for determining the outcome of referenda. The Act previously provided that the Plan should not be effective unless approved by not less than two-thirds of the producers and handlers voting in the referendum, or producers and handlers of not less than two-thirds of the watermelons produced and handled during the representative period by producers and handlers voting in the referendum, and by not less than a majority of the producers and a majority of the handlers voting in the referendum. The Act now specifies that the determination of the results of a referendum should be on the basis of a simple majority of the producers, handlers, and, if covered by the Plan, importers voting in the referendum. In order to make this change, this rule would amend § 1210.363.

Furthermore, § 1210.252 would be revised to correct a wording error made during the promulgation of the Plan and § 1210.322 would be revised to delete obsolete language.

In addition, § 1210.325 would be changed to reflect a change in the number of Board members that constitute a majority. This revision would reflect the addition of importer members to the Board.

Section 1210.505 would be amended to reflect the fact that the Department issues user fee bills to the Board monthly rather than quarterly.

In addition, miscellaneous conforming changes would be made to §§ 1210.251, 1210.302, 1210.328, 1210.340, and 1210.362.

Minor changes are made in this final rule for the purpose of clarity.

Referendum Order

It is hereby directed that a referendum be conducted among watermelon producers, handlers, and importers to determine whether they favor: (1) eliminating the provisions for assessment refunds and (2) implementing assessments on imported watermelons and adding importer members to the Board.

The referendum shall be conducted from November 1 to November 30, 1994. Ballots will be mailed to all known eligible watermelon producers, handlers, and importers on or before November 1, 1994. Eligible voters that do not receive a ballot by mail should call the Department's office in Washington, D.C. in order to receive a ballot. A toll free number will be available to request a ballot. All ballots will be subject to verification. Ballots must be received by the referendum agents no later than November 30, 1994, to be counted.

Sonia N. Jimenez and Martha B. Ransom, Research and Promotion Branch, Fruit and Vegetable Division, Agricultural Marketing Service, P.O. Box 96456, U.S. Department of Agriculture, Washington, D.C. 20090-6456, are designated as the referendum agents of the Secretary of Agriculture to conduct this referendum. The Procedure for the Conduct of Referenda in Connection with the Watermelon Research and Promotion Plan, 7 CFR 1210.200-1210.207, which is being published separately, shall be used to conduct the referendum.

List of Subjects in 7 CFR Part 1210

Agricultural promotion, Agricultural research, Market development, Reporting and recordkeeping requirements, Watermelons.

For the reasons set forth in the preamble, Part 1210, Chapter XI of Title 7 is proposed to be amended as follows:

PART 1210—WATERMELON RESEARCH AND PROMOTION

1. The authority citation for 7 CFR Part 1210 continues to read as follows:

Authority: 7 U.S.C. 4901-4916.

Subpart—Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Plans

§ 1210.251 [Amended]

2. In § 1210.251, paragraph (a) is amended by removing ";" and adding in its place ", as amended";

§ 1210.252 [Amended]

3. In § 1210.252, paragraph (b)(3) is amended by removing the word "order" and adding in its place "Plan".

Subpart—Watermelon Research and Promotion Plan

§ 1210.302 [Amended]

4. Section 1210.302 is amended by adding ", as amended" at the end of the sentence.

5. Section 1210.305 is revised to read as follows:

§ 1210.305 Watermelon.

Watermelon means all varieties of the Family Cucurbitaceae; Genus and Species: *Citrullus Lanatus*, popularly referred to as watermelon grown by producers in the United States or imported into the United States.

§ 1210.306 [Amended]

6. Section 1210.306 is amended by removing the word "five" and adding in its place "10".

7. A new § 1210.314 is added to read as follows:

§ 1210.314 Importer.

Importer means any person who imports watermelons into the United States as a principal or as an agent, broker, or consignee for any person who produces watermelons outside of the United States for sale in the United States.

8. A new § 1210.315 is added to read as follows:

§ 1210.315 United States.

United States means each of the several States and the District of Columbia.

9. Section 1210.320 is amended by revising paragraph (a) and adding new paragraphs (d), (e), and (f) to read as follows:

§ 1210.320 Establishment and membership.

(a) There is hereby established a National Watermelon Promotion Board, hereinafter called the "Board." The Board shall be composed of producers, handlers, importers, and one public representative appointed by the Secretary. An equal number of producer and handler representatives shall be nominated by producers and handlers pursuant to § 1210.321. The Board shall also include one or more representatives of importers, who shall be nominated in such manner as may be prescribed by the Secretary. The public representative shall be nominated by the Board members in such manner as may be prescribed by the Secretary. If producers, handlers, and importers fail to select nominees for appointment to the Board, the Secretary may appoint persons on the basis of representation as provided in § 1210.324. If the Board fails to adhere to procedures prescribed by the Secretary for nominating a public representative, the Secretary shall appoint such representative.

(d) Importer representation on the Board shall be proportionate to the percentage of assessments paid by importers to the Board, except that at least one representative of importers shall serve on the Board.

(e) Not later than 5 years after the date that importers are subject to the Plan, and every 5 years thereafter, the Secretary shall evaluate the average annual percentage of assessments paid by importers during the 3-year period preceding the date of the evaluation and adjust, to the extent practicable, the number of importer representatives on the Board.

(f) The Board consists of 14 producers, 14 handlers, at least one importer, and one public member appointed by the Secretary.

10. Section 1210.321 is amended by redesignating paragraphs (a), (b), and (c) as (b), (c), and (e) respectively; redesignating paragraph (d) as paragraph (f); removing new paragraph (f)(1) and redesignating new paragraphs (f)(2) and (f)(3) as paragraphs (f)(1) and (f)(2); revising new paragraphs (b) introductory text, (b)(1), (b)(4), (e), (f) introductory text, and (f)(1); removing in new paragraph (c) the word "positions" and adding in its place the phrase "producer and handler positions"; and adding new paragraphs (a) and (d) to read as follows:

§ 1210.321 Nominations and selection.

* * * * *

(a) There shall be two individuals nominated for each vacant position.

(b) The Board shall issue a call for nominations by February first of each year in which an election is to be held. The call shall include at a minimum, the following information:

(1) A list of the vacancies and qualifications as to producers and handlers by district and to importers nationally for which nominees may be submitted.

* * * * *

(4) The date, time, and location of any next scheduled meeting of the Board, national and State producer or handler associations, importers, and district conventions, if any.

* * * * *

(d) Nominations for importers positions that become vacant may be made by mail ballot, nomination conventions, or by other means prescribed by the Secretary. The Board shall provide notice of such vacancies and the nomination process to all importers through press releases and any other available means as well as direct mailing to known importers. All importers may participate in the nomination process: *Provided*, That a person who both imports and handles watermelons may vote for importer members and serve as an importer member if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

(e) All producers and handlers within the district may participate in the convention: *Provided*, That a person that produces and handles watermelons may vote for handler members only if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own

production and purchases from other producer's production is more than 50 percent of the producer's own production; and *provided further*, That if a producer or handler is engaged in the production or handling of watermelons in more than one State or district, the producer or handler shall participate within the State or district in which the producer or handler so elects in writing to the Board and such election shall remain controlling until revoked in writing to the Board.

(f) The district convention chairperson shall conduct the selection process for the nominees in accordance with procedures to be adopted at each such convention, subject to requirements set in section 1210.321(e).

(1) No State in Districts 3, 4, 5, and 7 as currently constituted shall have more than three producers and handlers representatives concurrently on the Board.

* * * * *

11. Section 1210.322 is amended by revising paragraphs (a), (b), and (d) to read as follows:

§ 1210.322 Term of office.

(a) The term of office of Board members shall be three years.

(b) Except in the case of mid-term vacancies, the term of office shall begin on January 1, or such other date as may be recommended by the Board and approved by the Secretary.

* * * * *

(d) No person shall serve more than two successive terms of office.

12. Section 1210.325 is amended by revising paragraph (a) to read as follows:

§ 1210.325 Procedure.

(a) A simple majority of Board members shall constitute a quorum and any action of the Board shall require the concurring votes of a majority of those present and voting. At assembled meetings all votes shall be cast in person.

* * * * *

§ 1210.328 [Amended]

13. Section 1210.328 is amended by removing in paragraphs (d) and (g) the word "collected" and adding in its place "received"; removing in paragraphs (g), (i), and (m) the phrase "and handlers" and adding in its place ", handlers, and importers"; removing in paragraph (k) the phrase "or handler" and adding in its place ", handler or importer"; and removing in paragraph (n) the word "handlers" and adding in its place "handlers, importers,".

§ 1210.340 [Amended]

14. Section 1210.340 is amended by removing in paragraph (b) the word "collected" and adding in its place "received".

15. Section 1210.341 is amended by revising paragraphs (a), and (b); redesignating paragraphs (d) through (i) as (e) through (j); revising redesignated paragraph (e); adding a new paragraph (d); removing in redesignated paragraphs (f) and (g) the word "handler" and adding in its place "handler or importer"; removing in redesignated paragraph (h) the word "handlers" and adding in its place "handlers and importers"; and removing in redesignated paragraph (f) the letter "(d)" and adding in its place "(e)" to read as follows:

§ 1210.341 Assessments.

(a) During the effective period of this subpart, assessments shall be levied on all watermelons produced and first handled in the United States and all watermelons imported into the United States for consumption as human food. No more than one assessment on a producer, handler, or importer shall be made on any lot of watermelons. The handler shall be assessed an equal amount on a per unit basis as the producer. If a person performs both producing and handling functions on any same lot of watermelons, both assessments shall be paid by such person. In the case of an importer, the assessment shall be equal to the combined rate for domestic producers and handlers and shall be paid by the importer at the time of entry of the watermelons into the United States.

(b) Assessment rates shall be fixed by the Secretary in accordance with section 1647(f) of the Act. No assessments shall be levied on watermelons grown by producers of less than 10 acres of watermelons.

* * * * *

(d) Each importer shall be responsible for payment of the assessment to the Board on watermelons imported into the United States through the U.S. Customs Service or in such other manner as may be established by rules and regulations approved by the Secretary.

(e) Producer-handlers and handlers shall pay assessments to the Board at such time and in such manner as the Board, with the Secretary's approval, directs, pursuant to regulations issued under this part. Such regulations may provide for different handlers or classes of handlers and different handler payment and reporting schedules to recognize differences in marketing

practices or procedures used in any State or production area.

* * * * *

16. Section 1210.342 is amended by designating the existing text as paragraph (a) and adding new paragraphs (b), (c), and (d) to read as follows:

§ 1210.342 Exemption from assessment.

* * * * *

(b) Importers of less than 150,000 pounds of watermelons per year shall be entitled to apply for a refund that is equal to the rate of assessment paid by domestic producers.

(c) The Secretary may adjust the quantity of the weight exemption specified in paragraph (b) on the recommendation of the Board after an opportunity for public notice and comment to reflect significant changes in the 5-year average yield per acre of watermelons produced in the United States.

(d) The Board shall have the authority to establish rules, with the approval of the Secretary, for certifying whether a person meets the definition of a producer under section 1210.306.

§ 1210.343 [Removed and Reserved]

17. Section 1210.343 is removed and reserved.

18. Section 1210.350 is amended by redesignating paragraphs (a) through (d) as (1) through (4); designating the introductory paragraph as paragraph (a); and adding new paragraphs (b) and (c) to read as follows:

§ 1210.350 Reports.

* * * * *

(b) Each importer of watermelons shall maintain a separate record that includes a record of:

- (1) the total quantity of watermelons imported into the United States that are included under the terms of this Plan;
- (2) the total quantity of watermelons that are exempt from the Plan; and
- (3) such other information as may be prescribed by the Board.

(c) Each importer shall report to the Board at such times and in such manner as it may prescribe such information as may be necessary for the Board to perform its duties under this part.

§ 1210.351 [Amended]

19. Section 1210.351 is amended by removing the word "handler" and adding in its place "handler and importer" and removing the word "two" and adding in its place "2".

§ 1210.352 [Amended]

20. Section 1210.352 is amended by removing in paragraph (a)(1) the word

"handlers" and adding in its place "handlers or importers".

§ 1210.362 [Amended]

21. Section 1210.362 is amended by removing the word "collected" and adding in its place "received"; and removing the word "plan" and adding in its place "Plan".

22. Section 1210.363 is amended by revising paragraph (b) to read as follows:

§ 1210.363 Suspension or termination.

* * * * *

(b) The Secretary may conduct a referendum at any time and shall hold a referendum on request of the Board or at least 10 percent of the combined total of the watermelon producers, handlers, and importers to determine if watermelon producers, handlers, and importers favor termination or suspension of this Plan. The Secretary shall suspend or terminate this Plan at the end of the marketing year whenever the Secretary determines that the suspension or termination is favored by a majority of the watermelon producers, handlers, and importers voting in such referendum who, during a representative period determined by the Secretary, have been engaged in the production, handling, or importing of watermelons and who produced, handled, or imported more than 50 percent of the combined total of the volume of watermelons produced, handled, or imported by those producers, handlers, and importers voting in the referendum. For purposes of this section, the vote of a person who both produces and handles watermelons will be counted as a handler vote if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production. *Provided*, That the vote of a person who both imports and handles watermelons will be counted as an importer vote if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. Any such referendum shall be conducted by mail ballot.

§ 1210.364 [Amended]

23. Section 1210.364 is amended by removing in paragraph (d) the phrase "and handlers" and adding in its place ", handlers and importers".

Subpart—Procedures for Nominating Members to the National Watermelon Promotion Board

Producer and Handler Members

24. The subpart heading "Subpart—Procedures for Nominating Producer and Handler Members to the National Watermelon Promotion Board" is revised; and a new undesignated center heading is added to read as set forth above.

25. In § 1210.401, paragraph (b) is revised to read as follows:

§ 1210.401 District conventions.

(b) District conventions are to be held to nominate producers and handlers as candidates for membership on the National Watermelon Promotion Board. Each district, as defined in § 1210.501, is entitled to two producer and two handler members on the Board.

26. Section 1210.402 is amended by revising paragraph (a); removing in paragraph (b) the phrase "or first handling" and adding in its place ", first handling or importing"; and removing in paragraph (b) the phrase "§ 1210.403" and adding in its place "§ 1210.403 and § 1210.404" to read as follows:

§ 1210.402 Voter and board member nominee eligibility.

(a) All producers and handlers within a district may participate in their district convention for the purpose of nominating candidates for appointment to the Board: *Provided*, That a producer who both produces and handles watermelons may vote for handler member nominees and serve as a handler member nominee only if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production or the combined total volume of watermelons handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production; and *Provided further*, That if a producer or handler is engaged in the production or handling of watermelons in more than one State or district, the producer or handler shall participate within the State or district in which the producer or handler so elects in writing to the Board and such election shall remain controlling until revoked in writing to the Board. For the purpose of participation in initial nominating conventions, such election shall be made in writing, at the address provided, to the Department official

identified in the call for a district convention.

27. A new undesignated center heading and Section 1210.404 are added to read as follows:

Importer Members

§ 1210.404 Importer member nomination and selection.

(a) The Board shall include one or more representatives of importers, who shall be appointed by the Secretary from nominations submitted by watermelon importers. Importers' representation on the Board shall be proportionate to the percentage of assessments paid by importers to the Board, except that at least one representative of importers shall serve on the Board if importers are subject to the Plan. Nominations for importer positions that become vacant shall be made by importers at nomination conventions or by mail ballot.

(b) The initial nomination of importer members shall be made not later than 90 days after the Plan is amended.

(c) There shall be two individuals nominated for each vacant position. The importer receiving the highest number of votes for a vacancy shall be the first choice nominee, and the importer receiving the second highest number of votes shall be the second choice nominee submitted to the Secretary.

(d) Any individual, group of individuals, partnership, corporation, association, cooperative or any other entity which is engaged in the production, first handling or importing of watermelons is considered a person and as such is entitled to only one vote, except that such person may cast proxy votes as provided in section 1210.404(e)(1) of this subpart.

(e) *Nomination Conventions.* If nominations are made by nomination conventions, the Board shall widely publicize such conventions and provide importers and the Secretary at least 10 days notice prior to each convention.

(1) Proxy voting by importers shall be permitted at all conventions. Any person wanting to cast proxy votes must demonstrate authorization to do so. Authority to cast a proxy vote on behalf of another person shall be demonstrated through documentation containing:

- (i) The proxy voter's name, address, and telephone number;
 - (ii) Signature and date signed;
 - (iii) A certification identifying the proxy voter as an importer; and
 - (iv) A statement identifying the person being given authority by the proxy voter to cast the proxy vote.
- (2) The Board shall provide to the Secretary a typed copy of each

convention's minutes and shall arrange for completion of qualification statements and other specified information by each nominee and forward such to the Secretary within 14 calendar days of completion of a convention.

(f) *Mail balloting.* If nominations are conducted by mail ballot, the Board shall request importers to submit nominations of eligible importers. It is the importer's responsibility to prove the individual's eligibility. After the names of nominees are received, the Board shall print ballots and ask eligible importers to vote to nominate their candidates. After the vote is received, the Board shall tabulate the results and shall send to the Department the nominees in order of preference. The Board shall provide the Secretary with a report on the results, number of importers participating in the vote, and the volume of imports, and shall arrange for completion of qualification statements and other specified information by each nominee and forward such to the Secretary within 14 calendar days of receiving the ballots.

(g) Any individual who both imports and handles watermelons will be considered an importer if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

§ 1210.503 [Redesignated as § 1210.405 and Amended]

28. Section 1210.503 is redesignated as § 1210.405, the first sentence of paragraph (a) is revised, and a new undesignated center heading is added to read as follows:

Public Member

§ 1210.405 Public member nominations and selection.

(a) The public member shall be nominated by the other members of the Board. * * *

Subpart—Rules and Regulations

§ 1210.505 [Amended]

29. Section 1210.505 is amended by removing the word "quarterly" and adding in its place "monthly".

30. Section 1210.515 is amended by revising paragraph (a); redesignating paragraph (b) as (c); and adding a new paragraph (b) to read as follows:

§ 1210.515 Levy of assessments.

(a) An assessment of two cents per hundredweight shall be levied on all watermelons produced for ultimate consumption as human food, and an assessment of two cents per

hundredweight shall be levied on all watermelons first handled for ultimate consumption as human food. An assessment of four cents per hundredweight shall be levied on all watermelons imported into the United States for ultimate consumption as human food at the time of entry in the United States.

(b) The import assessment shall be uniformly applied to imported watermelons that are identified by the numbers 0807.10.30007 and 0807.10.40005 in the Harmonized Tariff Schedule of the United States or any other number used to identify fresh watermelons for consumption as human food.

31. Section 1210.518 is amended by revising paragraphs (a) and (b); removing in paragraph (c)(1) the letter "(e)" and adding in its place "(b) and (e)" and removing the word "handler" and adding in its place "handler and importer"; removing in paragraph (c)(2)(viii) the word "five" and adding in its place "10"; and removing in paragraph (d)(1) the word "handler" and adding in its place "handler and importer" to read as follows:

§ 1210.518 Payment of assessments.

(a) *Time of payment.* The assessment on domestically produced watermelons shall become due at the time the first handler handles the watermelons for non-exempt purposes. The assessment on imported watermelons shall become due at the time of entry, or withdrawal, into the United States.

(b) *Responsibility for payment.* (1) The first handler is responsible for payment of both the producer's and the handler's assessment. The handler may collect the producer's assessment from the producer or deduct such producer's assessment from the proceeds paid to the producer on whose watermelons the producer assessment is made. Any such collection or deduction of producer assessment shall be made not later than the time when the first handler handles the watermelons.

(2) The U.S. Customs Service shall collect assessments on imported watermelons from importers and forward such assessments under an agreement between the U.S. Customs Service and the U.S. Department of Agriculture. Importers shall be responsible for payment of assessments directly to the Board of any assessments due but not collected by the U.S. Customs Service at the time of entry, or withdrawal, on watermelons imported into the United States for human consumption.

§ 1210.519 [Amended]

32. Section 1210.519 is amended by removing in the introductory paragraph the word "handler" and adding in its place "handler and importer"; by removing in paragraph (a) the word "handler's" and adding in its place "handler's and importer's"; and removing the word "Watermelon" from the introductory paragraph and paragraphs (a) and (b).

33. Section 1210.520 is revised to read as follows:

§ 1210.520 Refunds.

Each importer of less than 150,000 pounds of watermelons during any calendar year shall be entitled to apply for a refund of the assessments paid in an amount equal to the amount paid by domestic producers.

(a) Application form. The Board shall make available to all importers a refund application form.

(b) Submission of refund application to the Board. The refund application form shall be submitted to the Board within 90 days of the last day of the year the watermelons were actually imported. The refund application form shall contain the following information:

- (1) Importer's name and address;
- (2) Number of hundredweight of watermelon on which refund is requested;
- (3) Total amount to be refunded;
- (4) Proof of payment as described below; and
- (5) Importer's signature.

(c) Proof of payment of assessment. Evidence of payment of assessments satisfactory to the Board shall accompany the importer's refund application. An importer must submit a copy of the importer's report or a cancelled check. Evidence submitted with a refund application shall not be returned to the applicant.

(d) Payment of refund. Immediately after receiving the properly executed application for refund, the Board shall make remittance to the applicant.

34. Section 1210.521 is revised to read as follows:

§ 1210.521 Reports of disposition of exempted watermelons.

The Board may require reports by handlers or importers on the handling/importing and disposition of exempted watermelons and/or on the handling of watermelons for persons engaged in growing less than 10 acres of watermelons or in the case of importers, the importing of less than 150,000 pounds per year. Authorized employees of the Board or the Secretary may inspect such books and records as are appropriate and necessary to verify the reports on such disposition.

§ 1210.530 [Amended]

35. Section 1210.530 is amended by removing the word "handler" and adding in its place "handler and importer".

§ 1210.531 [Amended]

36. Section 1210.531 is amended by removing the word "handler" from the introductory text and adding in its place "handler and importer".

37. Section 1210.532 is revised to read as follows:

§ 1210.532 Confidential books, records, and reports.

All information obtained from the books, records, and reports of handlers and importers and all information with respect to refunds of assessments made to importers shall be kept confidential in the manner and to the extent provided for in § 1210.352.

Dated: August 24, 1994.

Lon Hatamiya,
Administrator.

[FR Doc. 94-21319 Filed 8-29-94; 8:45 am]

BILLING CODE 3410-02-P

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 124

Small Business Size Regulations; Minority Small Business and Capital Ownership Development Assistance

AGENCY: Small Business Administration.
ACTION: Proposed rule.

SUMMARY: The Small Business Administration (SBA) proposes to amend its regulations governing the Minority Small Business and Capital Ownership Development program authorized by sections 7(j)(10) and 8(a) of the Small Business Act, 15 U.S.C. 636(j)(10), 637(a). This proposed rule would amend both eligibility requirements for and contractual assistance provisions within the 8(a) program. Of particular note, this rule would recognize participation of Community Development Corporations in the 8(a) program to an extent that would not be inconsistent with the requirements of the 8(a) program as imposed by the Small Business Act, increase the personal net worth limitations for 8(a) applicants and Program Participants to take into account inflation, eliminate the distinctions established in SBA's regulations concerning "local" and "national buy" 8(a) requirements, eliminate the restrictions on the number and dollar value of 8(a) contracts received by Program Participants due to

SBA-approved "support levels", and eliminate the distinction for applying the competitive 8(a) requirements currently existing for indefinite quantity or indefinite delivery requirements.

DATES: Comments must be submitted on or before September 29, 1994.

ADDRESSES: Written comments should be addressed to Herbert L. Mitchell, Associate Administrator, Office of Minority Enterprise Development, U.S. Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Office of Minority Enterprise Development, (202) 205-6410.

SUPPLEMENTARY INFORMATION: This proposed rule, if adopted in final form, would (1) make several clarifications of the eligibility requirements for admission to SBA's 8(a) program, the need for which has been identified by SBA through the practical experience gained in operating the program and in defending the agency's actions in 8(a) eligibility appeals brought before SBA's Office of Hearings and Appeals (OHA), (2) authorize participation by business concerns owned by Community Development Corporations in the 8(a) program in accord with 42 U.S.C. 9815, and (3) make several changes to the 8(a) contractual assistance requirements, including eliminating 8(a) support levels and the concepts of local buy and national buy 8(a) requirements.

This rule would clarify that 8(a) eligibility decisions are based on the facts before the Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD) at the time of his/her eligibility decision. The rule would specify that actual control of the applicant concern must be in the hands of one or more socially and economically disadvantaged individuals at the time the appropriate district Certification and Eligibility Branch (C & E Branch) determines that an application for the 8(a) program is complete. Potential control or the power of disadvantaged individuals to change the applicant concern's Board of Directors or other aspects of control so that the applicant concern *could be* controlled by disadvantaged individuals, no matter how easily exercised, would not satisfy the requirement that the applicant be *actually* controlled by disadvantaged individuals at the time the SBA district office C & E Branch determines an application to be complete. One reason to require actual control at the time that an applicant applies for admission to the 8(a) program is to prevent "front companies" from being admitted to the

8(a) program. It is SBA's view that this potential for abuse would be greatly lessened by the clarifications made in this rule.

In addition, Section 626(a)(2) of the Omnibus Reconciliation Act of 1981, Pub. L. 97-35, codified at 42 U.S.C. 9815(a)(2), required "regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under section [8(a) of the Small Business Act]." The purpose of the subchapter referred to in this provision "is to encourage the development of special programs by which the residents of urban and rural low-income areas may, through self-help and mobilization of the community at large, with appropriate Federal assistance, improve the quality of their economic and social participation in community life in such a way as to contribute to the elimination of poverty and the establishment of permanent economic and social benefits." 42 U.S.C. 9801. SBA has not heretofore implemented this authority through regulations. This proposed rule would recognize participation of Community Development Corporations (CDCs) in the 8(a) program to an extent that would not be inconsistent with the requirements of the 8(a) program imposed by the Small Business Act.

SBA believes that only CDC-owned or financed small business concerns can be eligible for the 8(a) program, and not the CDC itself. This position is consistent with the Agency's longstanding regulations implementing the Small Business Act that a small business must be a for-profit business entity. See 13 CFR 121.403. Since CDCs are non-profit entities, they could not be considered small business concerns within the meaning of the size regulations and, hence, would not be eligible for the 8(a) program on that basis.

This rule is not intended to imply in any way that the basic requirement of the Small Business Act that 8(a) concerns be owned by disadvantaged individuals can be administratively changed. Presently, two statutory exceptions to this ownership requirement have been implemented in regulations. Subclauses 8(a)(4)(A)(i)(II) and (III) of the Small Business Act, 15 U.S.C. 637(a)(4)(A)(i)(II) and (III), statutorily extend 8(a) program eligibility to small business concerns which are owned by either an economically disadvantaged Indian tribe, or a wholly owned business entity of such a tribe, or a Native Hawaiian organization. These provisions have been implemented in 13 CFR §§ 124.112 and 124.113, respectively. The authority

for extending eligibility for the 8(a) program to CDC-owned entities is also statutory. Thus, similar to SBA's treatment of tribally-owned concerns and concerns owned by Native Hawaiian organizations, this proposed rule recognizes CDC-owned concerns in accord with the authority set forth in 42 U.S.C. 9815(a)(2).

Pursuant to this proposed rule, SBA would consider CDCs comparable to Indian tribes. A CDC could have an ownership interest in several business enterprises, just like an Indian tribe under current regulations. Where statute and implementing regulations authorize a tribally-owned business concern to participate in the 8(a) program, but not the tribe acting on its own behalf, SBA proposes that similar treatment be afforded CDCs and CDC-owned business concerns. SBA also believes that the regulatorily created exclusion from affiliation that has been afforded tribally-owned business concerns (i.e., one tribally-owned business is not considered affiliated with the tribe or other businesses owned by the tribe merely because of common tribal ownership) should be extended to CDC-owned business concerns as well (this proposal would also make that exclusion available to concerns owned by Native Hawaiian Organizations).

In order for any CDC-owned business to participate in the 8(a) program, SBA would apply the basic management and control requirements imposed by the Small Business Act for 8(a) program participation. Thus, the proposed rule would require that CDC-owned applicant concerns must be managed by one or more socially and economically disadvantaged individuals.

This proposed rule would also make changes, as needed, in various other eligibility and 8(a) contracting requirements. These changes are identified below in the section by section analysis of this proposed rule.

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:

Sections 121.906(b)(1)(iv) and 121.1106(b)(1)(iv) would be amended to permit a small business non-manufacturer to supply other than a product made in the United States for a small business set-aside or 8(a) contract where the procuring agency makes a non-availability determination pursuant to § 25.102(a)(4) of the Federal Acquisition Regulation. There has been some confusion as to whether a non-manufacturer could qualify as a small business if there was such a non-

availability determination under the Buy American Act and the Federal Acquisition Regulation. SBA did not intend to exclude non-manufacturers from small business set-aside and 8(a) contracts where such a non-availability determination has been made. This clarification should clear up any ambiguity in this area.

Section 121.1104 would be amended to impose its provisions on competitive as well as sole source 8(a) contracting opportunities. Heretofore, this regulation was inconsistent with competitive contracting procedures. Other minor changes for purposes of improved clarity would also be made to this section.

Section 121.1703(b) would be amended to clarify that only the AA/MSB&COD can appeal a Standard Industrial Classification (SIC) code assigned by a procuring agency contracting officer to either a sole source or a competitive 8(a) requirement. See discussion relating to proposed § 124.307(f).

Section 124.100 would be amended by adding definitions of the terms "CDC-owned concern", "Clear and convincing evidence", and "Community Development Corporation or CDC".

The definition of "Unconditional ownership" in § 124.100 would be amended to explain that a disadvantaged owner may use his/her ownership interest (e.g., stock) in an applicant or 8(a) concern as collateral for financing during the normal course of business without affecting his/her "unconditional" ownership in such concern, provided that complete control of the ownership interest remains with the disadvantaged owner absent any default in fulfilling the terms of the financing. However, events of default must be defined in commercially reasonable ways. Events of default beyond those that are deemed commercially reasonable could lead to a conclusion that unconditional ownership is not in the hands of the disadvantaged owner. This clarification is not intended to require a concern to obtain financing through a financial institution or to preclude, for example, seller-financed transactions. It is intended only to permit financing terms that are reasonable within the marketplace. This change is essential to ensure that applicant and 8(a) concerns have the flexibility they need to raise necessary capital. The requirement that disadvantaged owners "unconditionally" own and control an applicant or 8(a) concern should not restrict a firm's ability to raise capital under normal commercial terms and

conditions to assist it in becoming viable.

The proposed rule would eliminate the definitions for "local buy" and "national buy" requirements from § 124.100. All requirements other than construction requirements would be open to eligible 8(a) Participants nationally. To the extent possible, SBA seeks to lift restrictions that are otherwise not imposed in procurements conducted other than through the 8(a) program. This would result in all eligible 8(a) concerns nationally being able to submit offers in response to competitive 8(a) solicitations. In addition, a Program Participant could market and seek sole source 8(a) requirements nationally. Construction requirements would be exempt from this change because section 8(a)(11) of the Small Business Act, 15 U.S.C. 637(a)(11), requires, "to the maximum extent practicable," that 8(a) construction contracts "be awarded within the county or State where the work is to be performed." The proposed rule would make necessary changes in § 124.308(d), § 124.308(f), revised § 124.311(d), (old § 124.311(e)), revised § 124.311(e) (old § 124.311(f)), and revised § 124.311(f) (old § 124.311(h)) to eliminate the local and national buy concepts.

The proposed rule would make minor technical changes to §§ 124.101(a), 124.101(b), 124.102(a), 124.103, 124.104, and 124.109(d) to recognize that CDC-owned concerns would be eligible for participation in the 8(a) program.

Sections 124.101(a), 124.104 and 124.206(a) would be amended to clarify that the AA/MSB&COD's decision to approve or decline an application for 8(a) program participation would be based on whether the applicant concern complied with each of SBA's eligibility criteria at the time the concern's completed application for admission to the 8(a) program is sent to the Office of MSB&COD for processing or, in the case of a request for reconsideration, at the time the reconsideration application is deemed to be complete by SBA's Central Office. A change in circumstances submitted by an applicant concern subsequent to the date that an application or reconsideration action is sent to the Office of MSB&COD for processing would not be considered, unless it causes a loss of eligibility. The structure of the concern, including all necessary corporate formalities, would have to be in place prior to the Office of MSB&COD's processing of an application or request for reconsideration. A disadvantaged individual's ability to immediately

change the applicant's structure or effect a change in its control so that actual control of the concern is in the hands of disadvantaged individuals and/or other eligibility criteria are met would not satisfy the requirement that they be met at the time of the completed application. The rule would specify, however, that SBA, in its sole discretion, could request clarification of information contained in the application at any stage in the application process.

The decision of the AA/MSB&COD to approve or decline an application for 8(a) program admission would then be based on whether the application, as clarified by any information submitted in response to a request by SBA, demonstrates that the applicant concern complies with each of SBA's eligibility criteria. While SBA would be able to request and consider additional information in processing an 8(a) application, SBA would not consider information gratuitously submitted by an applicant concern after it submits its application. This clarification is needed to streamline the application process and ensure that SBA meets its statutorily imposed time limitation for processing applications.

Section 124.103 would be amended by adding a new paragraph (a) that would require direct ownership of 8(a) applicants or Program Participants by disadvantaged individuals. This statutory requirement is currently set forth in § 124.109, but SBA believes that it should be added to this section for clarification purposes. Present §§ 124.103(a) through (j) would be redesignated to become §§ 124.103(b) through (k). Sections 124.109(d) and (e) would be similarly amended.

Newly redesignated § 124.103(i) (old § 124.103(h)) would be amended to permit a former Program Participant to have an equity ownership interest of up to 20 percent in a current 8(a) concern in the same or similar line of business. Such a requirement would increase an 8(a) concern's ability to raise capital, while continuing to advance the economic viability of a former Program Participant after its 8(a) program term has expired. Section § 124.104(c)(2) would also be amended to permit the principal of a former Program Participant to have an equity ownership interest of up to 20 percent in a current 8(a) concern in the same or similar line of business as the former Program Participant.

Newly redesignated § 124.103(j) (old § 124.103(i)) would be amended to make clear that an 8(a) concern may substitute one disadvantaged individual for another without invoking the termination for convenience/waiver

provision of § 124.317 of these regulations with respect to any 8(a) contracts that it has been awarded on or after June 1, 1989. Provided program eligibility is maintained and SBA approves a substitution of one disadvantaged individual for another, performance of 8(a) contracts already received could continue without seeking a waiver under § 124.317. SBA believes that the statutory termination for convenience/waiver provision did not intend to prohibit the performance of an 8(a) contract by the 8(a) concern that initially received it simply where there has been one or more approved changes of particular individuals upon whom eligibility of the concern was based. This change is necessary to apprise procuring agencies and 8(a) concerns that termination of 8(a) contracts is not required in such instances.

Pursuant to proposed § 124.103(l), SBA would aggregate the ownership interests of a business concern and its principal(s) in determining whether a non-disadvantaged individual or business concern exceeds the 10 percent equity ownership limitations (or, in the case of a former Program Participant, the 20 percent equity ownership limitations) established by §§ 124.103 and 124.104.

This proposed rule would also add a new § 124.103(m), dealing with the applicability of state community property laws on the respective ownership interests in an applicant concern or a Program Participant once admitted to the Program. This revision would not be a change in SBA policy.

Section 124.104(a) would be reorganized for greater clarity and easier use. Of particular note, § 124.104(a) would be amended to specify that one or more disadvantaged individuals who are determined to manage the applicant or 8(a) concern must be physically located at the offices of the applicant or 8(a) concern be open during the normal 40-hour work week of most business concerns. Thus, this proposed provision would require that the disadvantaged individual(s) be present at the location of the applicant or 8(a) concern during those hours and not, for example, only at night or on the weekends. This rule does not imply that business activities of the applicant or 8(a) concern could not be conducted by such individual(s) outside the offices of the applicant or 8(a) concern, nor does it prohibit a disadvantaged individual from establishing an 8(a) concern at his/her home. It is meant to ensure only that one or more disadvantaged owners devote full-time to the business of the applicant or 8(a) concern. Under this

proposed amendment, SBA would not permit an individual to be physically located at a job which is separate and distinct from the applicant or 8(a) concern during normal business hours and claim that he/she is managing the applicant or 8(a) concern from that location.

Section 124.104(b) would be amended along the lines set forth above for §§ 124.101(a), 124.104 and 124.206(a). This amended paragraph would specify that the Board of Directors must actually be controlled by disadvantaged individuals. The power of a disadvantaged individual to control the Board of Directors indirectly through his/her right to vote his/her stock (i.e., the power to remove and replace directors) would not be sufficient to establish control of the Board of Directors if non-disadvantaged individuals on the Board of Directors could control, or assert negative control on, the Board as currently structured at the time of the application for admission to the 8(a) program. This paragraph would also provide that non-voting, advisory or honorary Directors may be appointed so long as they do not possess negative control over the Board. Similarly, a separate board of advisors, particularly in the context of tribally-owned applicants and 8(a) concerns, could be established provided such board of advisors could not actually run the day-to-day operations of or possess negative control over the applicant or 8(a) business concern.

In evaluating whether an individual's social disadvantage has negatively impacted on his or her entry into and/or advancement in the business world, § 124.105(c) would be amended to clarify that SBA will entertain any relevant evidence, but that SBA would consider the experiences of the individual, where applicable, in education, employment and business history. The failure to establish disadvantage in any one area (i.e., education, employment, or business history) would not prevent an individual from meeting this requirement of negative impact as long as the totality of the circumstances experienced by the individual demonstrate his/her disadvantage in entering into and/or advancing in the business world.

Section 124.106(a)(2)(i) would be amended by increasing the entry level personal net worth limitation from \$250,000 to \$300,000 in order to take into account inflation. The \$250,000 net worth figure was established by regulation in April 1989. Inflation increased 19.6 percent between April 1989 and March 1994 based on the

Consumer Price Index for All Urban Consumers. Applying the 19.6 percent inflation rate to the \$250,000 figure would increase the net worth limitation to \$299,000. This proposed rule would round that amount to \$300,000.

Section 124.106(a)(2)(ii) would clarify SBA's method of analysis in determining whether the applicant concern itself, as apart from its disadvantaged owner(s), should be considered economically disadvantaged. It would require SBA to compare an applicant concern to other small business concerns in the same four-digit Standard Industrial Classification Code which are not owned and controlled by socially and economically disadvantaged individuals.

Section 124.106(a)(2)(i)(A)(1) would be amended to provide that assets transferred by an individual claiming disadvantaged status to any immediate family member within two years prior to the date of application to the 8(a) program shall be presumed to be the property of the individual claiming disadvantaged status. Currently, property or assets transferred by an individual claiming disadvantaged status to his/her spouse within two years of the date of 8(a) application is presumed to be the property of the transferor for purposes of determining his/her economic disadvantage. SBA believes that a change is needed to prevent circumvention of its eligibility regulations by asset transfers to other than an applicant individual's spouse. Several applicants have avoided the intent of this regulation by transferring assets to children. SBA believes that it is necessary to prevent the recurrence of this practice, which if left unchanged, could admit firms into the 8(a) program that SBA believes should be considered ineligible.

Section 124.106(b) would be amended for clarity, and would increase the personal net worth limitation for the Small Disadvantaged Business program from \$750,000 to \$900,000 to take into account inflation since the \$750,000 standard was set in April 1989.

Section 124.107(b) would be amended to clarify that the requirement that an applicant concern possess technical and managerial experience to be deemed to have the required potential for success to be admitted to the 8(a) program was not meant to contradict the provision in § 124.104 that the individual(s) upon whom eligibility is based need not possess both management and technical capabilities. In order to have the requisite potential for success, an applicant concern must have both management and technical experience. Conversely, the individual(s) upon

whom eligibility is based must possess either management or technical capabilities to meet that part of the control requirement under § 124.104.

Section 124.108 would be amended by adding a new paragraph (d)(3) that would state that any 8(a) applicant that is a dealer or wholesaler would not be required to demonstrate that it is capable of supplying the product of a small business manufacturer in conjunction with its 8(a) application. In the past, there has been confusion as to whether SBA's non-manufacturer rule (i.e., the rule requiring a regular dealer to supply the product of a small business in order for it to be considered small for a specific 8(a) or small business set aside procurement) should be applied in determining an applicant's initial eligibility for the 8(a) program. SBA believes that because the Small Business Act authorizes waivers to the non-manufacturer rule in connection with a specific contract where SBA determines that no small business manufacturer can reasonably be expected to offer a product meeting the specifications of the solicitation, the non-manufacturer rule should have no bearing on an applicant's eligibility for the 8(a) program. In addition, the 8(a) program should not be viewed solely as a contracting program. There is other business development assistance available to Program Participants which should not be foreclosed because of the non-manufacturer rule. Regular dealer applicants to the 8(a) program should be aware, however, that they must generally meet the requirements of the non-manufacturer rule in order to be awarded specific 8(a) contracts as regular dealers.

Proposed § 124.109(f) would add a provision making an applicant to the 8(a) program ineligible for program participation if the proprietor, or a holder of at least 20 percent of the stock, or a partner, officer, director of the concern is currently incarcerated, on parole or on probation. This provision is derived from a similar determination of ineligibility for SBA financial assistance currently contained in 13 CFR 120.101-2(f).

Section 124.111 would be amended by revising paragraph (a)(2) to set the same personal net worth limitation for a Program Participant in either the developmental or transitional stage of program participation to maintain its continued 8(a) eligibility. Currently, the limit is \$500,000 for firms in the developmental stage of 8(a) program participation, \$750,000 for firms in the transitional stage of 8(a) program participation, and \$750,000 for purposes of eligibility for the Department of

Defense's Small Disadvantaged Business (SDB) program. This rule would eliminate the separate net worth figure for firms in the developmental stage (i.e., eliminating the current \$500,000 amount). It would then apply the \$750,000 amount, adjusted for inflation, to all participant firms to make the requirement for developmental firms consistent with continued eligibility for transitional firms and simplify program administration. As with the entry level personal net worth limitation amount, the \$750,000 figure would also be increased by 19.6 percent due to inflation (see discussion relating to proposed § 124.106(a)(2)(i)). A straight inflation adjustment would produce a net worth limitation of \$897,000. This proposed rule would round that amount to \$900,000.

Section 124.111(c)(5) would be amended to further restrict excessive withdrawals from 8(a) Program Participants by their owners or managers. Specifically, a Participant could no longer claim that large withdrawals from the Participant should not be restricted where the concern's net worth has continued to increase throughout the period of time the withdrawals are made. Certain Program Participants have attempted to claim that excessive withdrawals could not be penalized where the Participant's net worth continued to increase because the withdrawals were not detrimental to the attainment of its business plan. The 8(a) program is designed to foster the development of business concerns owned by disadvantaged individuals. The fact that Participant's net worth has increased does not mean that it would not have increased more or achieved greater success but for excessive withdrawals by its owners/managers.

Section 124.112(c)(2)(iv) would be amended to clarify the requirements pertaining to a joint venture between an 8(a) concern owned by an Indian tribe and a concern determined to be other than small. There has been some concern that this regulation required a majority of the performance of such a contract to be performed on an Indian reservation or land owned by the tribe. This was not the intent. This proposed rule would amend this provision to make it consistent with the same provision contained in § 124.321 which requires only that the tribally-owned 8(a) concern must perform most of its activities generally on the reservation or tribally-owned land in order to be eligible to joint venture with a large business. This provision contains no specific requirement that the work done through the joint venture must be done on the Indian reservation or tribally-

owned land. However, it is necessary not to overlook two requirements which may perpetuate that requirement in some instances—that the concern must be located on the reservation or tribally-owned land, and that the 8(a) participant to a joint venture must meet the performance of work requirements imposed by § 124.314. See § 124.321(f).

Section 124.113 would be amended by adding an exclusion from affiliation for concerns owned by a Native Hawaiian Organization, by prohibiting a Native Hawaiian Organization from owning more than one current or former 8(a) Participant having the same primary industry classification, and by excluding from the one-time individual eligibility requirement any individual who merely manages a concern owned by a Native Hawaiian Organization.

The proposed rule would add a new § 124.114 which would specifically authorize CDC-owned small business concerns to participate in the 8(a) program. The same amendments added to § 124.113 for Native Hawaiian Organizations would be added to this section regarding CDC-owned concerns.

Minor clarifying language would be added to § 124.206(c)(1) regarding the time frame for an applicant concern to request a reconsideration, and where such a request must be made.

Sections 124.208(c) and 124.209(b) would be amended to streamline the procedures governing graduation and termination of 8(a) Program Participants respectively. This rule would eliminate the second letter of notification and the second 45 day response period provided in § 124.208(c) and § 124.209(b).

Additionally, this rule would change the time period in which the Division Director must make a recommendation on graduation to the AA/MSB&COD. The rule would change the time frame for the Division Director's recommendation to the AA/MSB&COD from 15 days to 45 days.

Section 124.209(b) currently provides the same procedures and time limits regarding termination actions as are discussed above with regard to graduation from the 8(a) program. This rule would make the same changes to the termination procedures as are discussed above with regard to graduation from the 8(a) program.

The proposed rule would amend the procedures concerning remands of 8(a) eligibility appeals by OHA to the AA/MSB&COD. Section 124.210(h)(2) would clarify that the AA/MSB&COD would issue a decision in accordance with a remand order of the Administrative Law Judge within 10 working days of the remand, unless the AA/MSB&COD requests and the Administrative Law

Judge grants an extension thereof. An applicant or 8(a) concern could then appeal the AA/MSB&COD's remand decision to OHA within 20 working days of the date that the decision is mailed. The failure of an applicant to file an appeal within the 20-day time frame would serve to make the remand decision the final agency decision and would not require any further action by OHA.

Section 124.210 would be further amended by adding a new paragraph (k) to specifically authorize reconsideration of 8(a) eligibility appeal decisions made by SBA's Office of Hearings and Appeals. Reconsideration would be specifically authorized where a petitioning party establishes a clear error of law or fact affecting the decision in the case.

Section 124.302 would be amended to ease the restrictions on adding SIC codes once a concern is admitted to the 8(a) program. The proposed rule would permit SBA to approve an additional SIC code as long as a rational business explanation exists for acquiring the requested SIC code. SBA seeks to make it clear that the authority to make decisions regarding what types of business ventures an 8(a) concern should get involved in rests with the 8(a) concerns themselves. Thus, for example, an 8(a) concern may acquire or develop the capability to perform contracts in an industry not directly related to the 8(a) concern's primary business and seek to add the appropriate SIC code(s), or it may hire an additional key employee that opens up new avenues of work to the 8(a) concern and seek to add additional SIC codes. In addition, SBA proposes to shorten the time it takes SBA to respond to a request for a change in SIC code designations from 45 days to 30 days.

The proposed rule would amend § 124.305(b)(3) regarding what a Program Participant must demonstrate to qualify for an 8(a) bond exemption. As currently written, in order to qualify for a bond exemption, an 8(a) Program Participant must, among other things, demonstrate that it cannot obtain a bond for the performance of the specific 8(a) requirement at issued by submitting to SBA written denials from at least two sureties, one of which is a corporate surety and one of which is an individual surety. Based on experience with this provision, SBA believes that the requirement that two sureties decline to issue the required bond is unnecessary. As such, the proposed rule would amend § 124.305(b)(3) to require a Participant to demonstrate only that it cannot obtain a bond from one corporate (Treasury-listed) surety.

The proposed rule would revise § 124.305(c)(4) to provide that a Program Participant may be eligible to receive only two bond exemptions at any one time. In other words, although up to five bond exemptions per Program Participant are authorized, a Participant may not have more than two active 8(a) contracts at a time for which it has received a bond exemption.

This proposed rule would also eliminate the requirement that a Program Participant not be permitted to receive 8(a) contracts in excess of its approved 8(a) support level. However, this would not affect SBA's authority to impose a limit on the amount of 8(a) contract awards as a part of a remedial action plan where a firm fails to meet its competitive business mix requirements. A concern would still be required to project in its business plan its anticipated level of 8(a) contract support, but such level would be used only as a planning and development tool. Section 124.307 would be amended by redesignating paragraph "(d)" as paragraph "(e)" and by adding a new paragraph "(d)" that would eliminate approved 8(a) support levels as a basis for denying 8(a) contract awards in excess of those levels. SBA believes that Program Participants should be afforded the flexibility to seek out and receive 8(a) contracts so long as they are capable and responsible to perform those contracts and meet their competitive business mix requirements. SBA would still determine whether a Participant was responsible to perform a particular 8(a) procurement requirement, and could determine that the concern did not have the capacity to perform the extra work, but, except as part of an approved remedial action plan, it could not withhold award merely because the concern would exceed (or has exceeded) its approved support level.

Section 124.307 would be further amended by adding a new paragraph "(f)" that would prohibit any party from challenging the eligibility of a Program Participant for a specific sole source or competitive 8(a) requirement at SBA or any other administrative forum. Much of this provision is currently contained in § 124.311(g) for competitive 8(a) requirements, but no such specific language was set forth for sole source 8(a) requirements. The regulatory language appearing in § 124.311(g) would be moved into this new provision and would be expanded to apply to sole source 8(a) procurements as well. Section 124.311(g) would be removed as unnecessary.

In addition, the proposed rule would specify that only the AA/MSB&COD

could file a SIC code appeal in connection with either a sole source or competitive 8(a) requirement. While this restriction appears in § 121.1703, as part of SBA's size and SIC code appeal regulations, it was not similarly contained in the 8(a) regulations. SBA believes that it should appear in both places for clarity and ease of use. It would specifically apply to both sole source and competitive 8(a) requirements. SBA reviews every SIC code to determine its appropriateness, but so long as the code assigned by the procuring agency contracting officer is reasonable, SBA will concur. SBA frequently goes back to a procuring agency to dispute a SIC code when it feels that the statement of work indicates that the assigned SIC code is inappropriate. Discussions between SBA and the procuring agency normally clear up any confusion. As part of this process, any party may submit evidence to SBA to explain why it believes another SIC code should be assigned to the procurement. SBA will consider such information and will seek a SIC code change if it believes that the SIC code assigned by the procuring agency is unreasonable.

Section 124.308(c) would be amended to specify where 8(a) offerings should be sent in light of the changes made by this rule eliminating local and national buy requirements. Under the proposed rule, all requirements that are offered to the 8(a) program as competitive procurements and those sole source requirements that are offered to the program without nominating a specific Program Participant (i.e., open requirements) would be offered to SBA's Division of Program Development in SBA's Central Office. Sole source requirements that are offered to the 8(a) program on behalf of a specific Program Participant would be offered to the appropriate SBA district office.

Section 124.308(d) would be amended to clarify the distinction between accepting a competitive 8(a) requirement on behalf of the 8(a) program generally and a sole source 8(a) requirement on behalf of a particular 8(a) Program Participant. In addition, the proposed rule would prohibit a procuring agency from conducting a competitive 8(a) requirement prior to obtaining SBA's acceptance of the requirement for the 8(a) program. Any competition so held would not be considered an 8(a) competition. If a procuring agency still wanted to fulfill its requirement through the 8(a) program, the requirement would have to be offered to and accepted by SBA for the 8(a) program, and the procuring agency would have to use applicable

8(a) competitive procedures after the acceptance. The procuring agency would again be required to synopsise the procurement in the Commerce Business Daily. A new solicitation would have to be issued, and new offers would have to be submitted and evaluated.

Section 124.308 would also be amended, by adding a paragraph (d)(4), to permit all eligible 8(a) concerns nationally to submit offers in connection with 8(a) competitive requirements other than construction requirements.

Sections 124.308(e)(1)(iii), 124.311(f)(4), 124.311(f)(5), 124.312(b), and 124.312(c) would be amended by removing any provisions pertaining to 8(a) support level requirements.

The rule would add a new § 124.308(i) pertaining to Basic Ordering Agreements (BOAs). This provision would state that each order to be issued under a BOA, and not the BOA itself, is a contracting action. As such, there must be a separate offer and acceptance for each order. As with any other new offer, SBA would determine eligibility for an order under a BOA at the time of the issuance of the order. This would require a concern to remain a small business at the time the order is to be issued and would prohibit orders from being issued to concerns whose program terms have expired or who have otherwise exited the 8(a) program.

Section 124.309(c) would be amended to clarify SBA's intent regarding the concept of adverse impact. Under the proposed rule, "adverse impact" could be found to exist where several requirements currently being performed by different small business concerns are bundled into one larger requirement which could be considered "new" under SBA's regulations due to the magnitude of the bundled requirement. This rule would permit SBA to find adverse impact in such a case where at least one of the small business concerns losing work that is to be bundled meets the presumption of adverse impact.

This rule also proposes to amend § 124.311(a) concerning how the competitive threshold requirements should be applied for indefinite quantity and indefinite delivery requirements. Currently, § 124.311(a)(2) specifies that "[f]or purposes of indefinite quantity/delivery contracts, the thresholds will be applied to the guaranteed minimum value of the contract." This requirement has proven unworkable because of the immense differences noted between the "guaranteed minimum" amounts on procurements offered to the 8(a) program and the maximum amounts

authorized under the procurements, and has been subject to substantial criticism. Procuring agencies can presently offer very large procurement requirements to the 8(a) program as indefinite quantity type requirements with guaranteed minimum amounts below the applicable 8(a) competitive threshold in order for contracts to be procured on a sole source basis, even though the procurement would likely exceed the applicable competitive threshold during the performance of the contract. Requirements that traditionally were procured through other contract types were being offered and accepted into the 8(a) program as indefinite quantity requirements solely to take advantage of the guaranteed minimum rule. In order to eliminate this potential abuse, SBA proposes to amend its regulations to specify that the competitive threshold requirements would be applied for *all* types of contracts, including indefinite quantity/delivery contracts, to the Government estimate of the requirement, including options, as identified by the procuring agency.

The proposed rule would amend newly redesignated §§ 124.311(d), (f) and (g) (old §§ 124.311(e), (h), and (i)) to take into account the proposed change made in § 124.308(d)(4) that would permit all eligible Program Participants nationally to submit offers in response to 8(a) competitive solicitations, other than for construction requirements.

Proposed redesignated § 124.311(g) (old § 124.311(i)) would clarify SBA's implementation of § 8(a)(1)(C) of the Small Business Act, 15 U.S.C. 637(a)(1)(C), which authorizes competitive 8(a) awards in limited circumstances to firms which have completed their terms of participation in the 8(a) program. Of particular note, SBA would specify in the regulations that eligibility would be determined as of the initial date specified for the receipt of offers set forth in the solicitation without regard to extensions of time through amendments to the solicitation. The date for determining eligibility would thus be firmly established and could not change during the procurement process. With such a date certain, firms know up front if their program term will expire prior to that specified date. Offers would not be prepared amid uncertainty that the date for determining eligibility could be changed. As such, firms would not be dissuaded from participating in 8(a) competitive procurements during the later stages of their participation terms.

Section 124.317 would be amended to specify that only physical or mental incapacity, and not criminal incarceration or bankruptcy, could be a

basis for a waiver of the termination for convenience requirement imposed by this section. In addition, this section would be amended to make clear that the burden is on the concern requesting a waiver to specify the ground(s) upon which the waiver is being sought and to demonstrate that it has met the ground(s). The Agency is not expected to raise every possible basis for waiver and to then dismiss them as not applicable.

The proposed rule would add a new § 124.319(c). This provision would clarify that SBA may novate one 8(a) Program Participant for another (with the consent of the procuring agency) where the first concern cannot complete performance of an 8(a) contract, without seeking the approval of the Administrator under § 124.317.

Section 124.321(a) would be amended to clarify that an 8(a) concern seeking to joint venture with another firm must bring something of value to the joint venture arrangement other than its status as an 8(a) concern. While the regulation would continue to state that a joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, it would specify for the first time that where the 8(a) concern lacks the management, technical and financial capacity to perform, a joint venture will not be approved. An 8(a) concern may be lacking in one or even two of these areas, but cannot be totally reliant on its proposed joint venture partner. The purpose of permitting joint ventures is to enable an 8(a) firm to gain experience and know-how so that it can become self-reliant in the future. If all an 8(a) concern will gain from the relationship is a profit, without developing its own capabilities in any way, the joint venture will not be approved.

Proposed § 124.321(c)(3) would clarify that a joint venture can be made up of two or more 8(a) concerns without any one firm receiving at least 51 percent of the net profits earned by the joint venture. In particular, a 50/50 joint venture arrangement between two 8(a) concerns would be expressly authorized, provided the other regulatory requirements were met.

The rule would make minor clarification changes in § 124.321(d) to recognize the possibility of a joint venture made up of two or more 8(a) concerns.

Proposed new § 124.321(i) would establish criteria relating to joint ventures for Small Disadvantaged Business (SDB) set-asides and SDB evaluation preferences. In the past, SBA has held the position that SBA could

not establish eligibility criteria relating to joint ventures for the Department of Defense's SDB program. A recent decision by the United States Court of Federal Claims held that "the power to interpret the term small business concerns . . . owned and controlled by socially and economically disadvantaged individuals [for purposes of DOD's SDB program] is wholly and exclusively within the sphere of SBA's authority," and that "SBA has both the power and the duty to define the bounds of [that] phrase." *Y.S.K. Construction Co., Inc. v. United States*, No. 93-738 at 10, 11 (Fed. Cl. Feb. 18, 1994). This proposed rule attempts to implement that authority in a way that is consistent with the purposes of the SDB program. While the rules vary somewhat from those pertaining to joint ventures in the 8(a) program, the developmental purposes of the 8(a) program are not totally consistent with the purposes of the SDB program. In addition, the rule applies the statutory requirement that the "majority of the earnings of [an SDB contract] directly accrue to [disadvantaged] individuals." Pub. L. 99-661, Sec. 1207(a)(1). Therefore, although an 8(a) concern that is 51 percent owned and controlled by disadvantaged individuals can joint venture with a 100 percent nondisadvantaged concern for a particular 8(a) contract (provided the 8(a) joint venture requirements are met), an SDB concern that is 51 percent owned and controlled by disadvantaged individuals cannot joint venture with a 100 percent nondisadvantaged concern for a particular SDB contract. In such a case, a majority of the earnings of the SDB contract could not accrue directly to disadvantaged individuals.

Section 124.501 would be amended by adding a new paragraph "(c)" and redesignating current paragraph "(c)" as paragraph "(d)." The newly established § 124.501(c) would require the submission of annual audited financial statements by 8(a) Program Participants.

This proposed rule would also add a new § 124.611 that would make SBA Small Disadvantaged Business status decisions issued pursuant to § 7(j)(11)(F)(vii) of the Small Business Act, 15 U.S.C. 636(j)(11)(F)(vii), available in full text. The decisions would be available for review in the law library located in SBA's central office. This new section would implement the requirements imposed by section 221 of the Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. 102-366, 106 Stat. 986, 999.

Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

This rule was not reviewed under Executive Order 12866.

SBA certifies 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, et seq. This rule is necessary to resolve several points relating to eligibility for SBA's Section 8(a) program and the procedures relating to appeals of denials of eligibility. It would also clarify/amend the requirements by which an 8(a) concern could obtain an exemption to the Miller Act bond requirements. The contracting opportunities offered to the 8(a) program should not be affected by this proposed rule. Whether a particular 8(a) concern would be eligible for participation in or, once in, could receive a bond exemption (and, therefore, whether it, as opposed to another 8(a) concern, would be awarded a particular 8(a) contract) could be affected by the rule. The rule would have no effect, however, on the amount or dollar value of any contract requirement or the number of such requirements reserved for the 8(a) program. Therefore, it 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.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this proposed rule, if adopted in final form, would contain no new reporting or record keeping requirements.

For purposes of Executive Order 12612, SBA certifies that this rule would not have any federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in Section 2 of that Order.

List of Subjects

13 CFR Part 121

Government procurement; Government property; Grant programs—business; Loan programs—business; Small businesses.

13 CFR Part 124

Government procurement; Hawaiian natives; Minority businesses; Reporting and record keeping requirements;

Technical assistance; Tribally-owned concerns.

For the reasons set forth above, SBA hereby proposes to amend part 121 of Title 3, Code of Federal Regulations, and subpart A, part 124 of Title 13, Code of Federal Regulations (CFR), as follows:

PART 121—[AMENDED]

1. The authority citation for 13 CFR Part 121 would continue to read as follows:

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a) and 644(c); and Pub. L. 102-486, 106 Stat. 2776, 3133.

2. Section 121.906(b)(1)(iv) would be revised to read as follows:

§ 121.906 Manufactured products under small business set-aside procurements.

(b) * * *

(1) * * *

(iv) Represents that it will furnish an end product that was manufactured or produced in the United States, unless the procuring agency makes a non-availability determination pursuant to § 25.102(a)(4) of the Federal Acquisition Regulations.

§ 121.1103 [Amended]

3. Section 121.1103(b) would be amended by adding the words "sole source or competitive" after the word "particular" and before the phrase "section 8(a) contract."

4. Section 121.1104 would be amended by revising paragraph (a), the introductory text of paragraphs (b) and (b)(2), and paragraph (f) to read as follows:

§ 121.1104 Section 8(a) self-certification.

(a)(1) After SBA has notified a procuring agency in writing that it has accepted a requirement for the 8(a) program, the 8(a) concern shall certify that it is a small business for the purpose of performing that particular contract (by certifying that it is small with respect to the size standard corresponding to the SIC code assigned to the requirement) at the time it submits its initial offer including price to the procuring agency for that contract.

(2) Size certifications occurring prior to SBA's acceptance of a requirement for the 8(a) program shall have no effect.

(i) Where a procuring agency conducts an 8(a) competition without first obtaining SBA's acceptance of the requirement for the 8(a) program, any size certification made in response to the solicitation issued by the procuring agency shall have no effect.

(ii) Where a procuring agency negotiates directly with an 8(a) Program Participant for a sole source 8(a) requirement, any size certification occurring prior to SBA's acceptance of the requirement for the 8(a) program shall have no effect.

(b) Once a procuring agency has determined that award of a sole source or competitive contract should be made to a particular 8(a) Program Participant, SBA shall verify that the selected concern is small as of the date of its initial offer including price.

(1) * * *

(2) Where SBA verifies that the selected 8(a) concern is small for a particular procurement, changes in size subsequent to the concern's self-certification (i.e., changes occurring between the date of certification and the date of award), except those due to merger with or acquisition by another business concern, will not affect the concern's size status as it relates to that procurement.

(i) * * *

(f) Where the selected 8(a) concern does not timely request a formal size determination, SBA (1) in connection with a sole source 8(a) requirement, may accept the procurement in support of another 8(a) concern, or may return the procurement from the 8(a) program, as appropriate, or (2) in connection with a competitive 8(a) requirement, shall notify the procuring agency of its determination and shall request that it select another apparent successful offeror.

5. Section 121.1106(b)(1)(iv) would be revised to read as follows:

§ 121.1106 Manufactured products under section 8(a) contracts.

* * * * *

(b) * * *

(1) * * *

(iv) Represents that it will furnish an end product that was manufactured or produced in the United States, unless the procuring agency makes a non-availability determination pursuant to § 25.102(a)(4) of the Federal Acquisition Regulation.

* * * * *

§ 121.1703 [Amended]

6 Section 121.1703(b) would be amended by adding the words "sole source or competitive" after the word "particular" and before the words "8(a) contract."

PART 124—[AMENDED]

Subpart A—Minority Small Business and Capital Ownership Development

7. The authority citation for part 124 would be revised to read as follows:

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

§ 124.7 [Amended]

8. Section 124.7(b) would be amended by removing paragraph (b)(1) and by redesignating paragraph (b)(2) as paragraph (b).

9. Section 124.100 would be amended by removing the terms "Local buy item" and "National buy item", and by adding, in alphabetical order, the following new definitions for the terms "Clear and convincing evidence", "Community Development Corporation or CDC", and "CDC-owned concern":

§ 124.100 Definitions.

* * * * *

CDC-owned concern means any concern at least 51 percent owned by a Community Development Corporation as defined in this section.

* * * * *

Clear and convincing evidence means an abiding conviction that the truth of the factual contentions is highly probable.

Community Development Corporation or CDC means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805 et seq.

* * * * *

10. Section 124.100 would be further amended by adding the new definition "Unconditional ownership" to read as follows:

§ 124.100 Definitions.

* * * * *

Unconditional ownership * * * The pledge of stock or other ownership interest in an applicant or 8(a) concern as collateral under normal commercial conditions does not affect a disadvantaged owner's "unconditional" ownership in such concern.

11. Section 124.101 would be amended by revising paragraph (a) and the first sentence of paragraph (b) to read as follows:

§ 124.101 The 8(a) program: General eligibility.

(a) In order to be eligible to participate in the 8(a) program, an applicant concern and an individual upon whom eligibility is based must meet all of the eligibility criteria set forth in §§ 124.102 through 124.109. An applicant concern

owned and controlled by an Indian tribe must meet the requirements set forth in § 124.112 and in §§ 124.102 through 124.109 as applicable. An applicant concern owned and controlled by a Native Hawaiian Organization must meet the requirements set forth in § 124.113 and in §§ 124.102 through 124.109 as applicable. An applicant concern owned and controlled by a Community Development Corporation must meet the requirements set forth in § 124.114 and in §§ 124.102 through 124.109 as applicable.

(1) An applicant concern's eligibility will be based on whether the concern meets each of SBA's eligibility criteria at the time the concern's completed application for admission to the 8(a) program is sent to the Office of MSB&COD for processing or, in the case of a request for reconsideration, at the time the reconsideration application is deemed to be complete by SBA's Central Office. SBA, in its sole discretion, may, however, request clarification of information contained in the application or request for reconsideration at any time in the application process.

(i) SBA will consider only additional information submitted by an applicant in response to an SBA request for clarification. Changes in an applicant concern that SBA becomes aware of between the date of application (or request for reconsideration) and the decision of the AA/MSB&COD that adversely affect the applicant's eligibility for 8(a) program participation will be considered and constitute grounds for decline.

(ii) The decision of the AA/MSB&COD to approve or decline an application for 8(a) program admission shall be based on whether the application, as clarified by any information submitted in response to a request by SBA, demonstrates that the applicant concern complies with each of SBA's eligibility criteria.

(2) All determinations made by the AA/MSB&COD concerning the eligibility of an applicant concern for participation in the 8(a) program shall be in writing, setting forth the findings based on relevant facts and in accordance with applicable law and regulations.

(3) An applicant concern which is declined 8(a) program admission may request a reconsideration of such decline, as set forth in § 124.206.

(i) If the application is declined on reconsideration based solely on a negative finding of social disadvantage, economic disadvantage, ownership or control, such decline may be appealed

by an unsuccessful applicant to the SBA's Office of Hearings and Appeals.

(ii) If no reconsideration is sought, or if after reconsideration the application is declined based in whole or in part on a ground other than a negative finding of social disadvantage, economic disadvantage, ownership or control, the written decline of the AA/MSB&COD is final and not subject to appeal.

(4) The procedures by which an applicant concern may appeal the AA/MSB&COD's denial of 8(a) program admission to SBA's Office of Hearings and Appeals, and the grounds for which such an appeal may be brought, are set forth in § 124.210 and part 134 of this title. Where such an appeal is brought, the written decision of the Office of Hearings and Appeals shall be the final Agency decision.

(5) A concern which has been declined for 8(a) program admission must wait at least 12 months from the date of the final Agency decision before it can reapply for program admission.

(b) In order to continue its participation in the 8(a) program, a Program Participant must continue to meet all eligibility requirements described in §§ 124.102 through 124.109, § 124.111(a), and § 124.112, § 124.113 or § 124.114, if applicable. * * *

12. Section 124.102(a) would be revised to read as follows:

§ 124.102 Small business concern.

(a) In order to be approved for participation in the 8(a) program, an applicant concern must qualify as a small business concern as defined in part 121 of this title. The particular size standard to be applied will be based on the primary industry classification of the applicant concern. The size of a tribally-owned concern, a concern owned by a Native Hawaiian Organization, or a concern owned by a Community Development Corporation shall be additionally determined by reference to § 124.112, § 124.113 or § 124.114, respectively. * * *

13. Section 124.103 would be amended by revising the introductory text, redesignating current paragraphs (a) through (j) as paragraphs (b) through (k), respectively, adding a new paragraph (a), revising newly redesignated paragraph (g) and the first sentence of newly redesignated paragraph (i), adding a new sentence at the end of newly redesignated paragraph (j), and by adding new paragraphs (l) and (m) as follows:

§ 124.103 Ownership requirements.

Except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations, as defined in § 124.100, in order to be eligible to participate in the 8(a) program, an applicant concern must be at least 51 percent unconditionally owned by an individual(s) who is a citizen of the United States (specifically excluding permanent resident alien(s)) and who is determined by SBA to be socially and economically disadvantaged. Special ownership requirements for concerns owned by Indian tribes and Alaska Native Corporations are set forth in § 124.112. Ownership requirements for Native Hawaiian Organizations are set forth in § 124.113. Ownership requirements for Community Development Corporations are set forth in § 124.114.

(a) Ownership of an applicant or 8(a) concern by one or more disadvantaged individuals must be direct ownership.

(1) An applicant concern owned by another business entity that is owned and controlled by one or more disadvantaged individuals does not meet the requirement that it be owned by disadvantaged individuals.

(2) An applicant concern that is owned by a trust which is in turn owned and controlled by a disadvantaged individual does not meet the requirement that it be owned by disadvantaged individuals. * * *

(g) The individuals determined to be disadvantaged in one 8(a) concern, their immediate family members residing in the same household, and the 8(a) concern itself may not hold, in the aggregate, more than a 10 percent equity ownership interest in any other single 8(a) concern.

(h) * * *

(i) A non-8(a) concern in the same or similar line of business is prohibited from having an equity ownership interest in an 8(a) concern which exceeds 10 percent, except that a former Program Participant may have an equity ownership interest of up to 20 percent in a current 8(a) concern in the same or similar line of business. * * *

(j) * * * While SBA approval must be obtained, the substitution of one disadvantaged individual for another disadvantaged individual within an 8(a) concern that was awarded one or more 8(a) contracts does not require termination of those contracts under § 124.317 of these regulations or a request for waiver of that termination requirement.

(k) * * *

(l) The ownership interests of business concern and its principal(s) are considered to be aggregated in determining whether a non-disadvantaged individual or business concern exceeds the 10 percent equity ownership limitations (or, in the case of a former Program Participant, the 20 percent equity ownership limitations) established by this section and § 124.104.

(m) In determining the respective ownership interests in an applicant concern, or in a Program Participant once admitted to the program, SBA considers applicable state community property laws.

(1) In a community property state, even when only one spouse's name appears on a document of title or stock certificate, both spouses are considered to have one-half interest in that property as long as the property is acquired, earned, or accumulated during the course of the marriage.

(2) If SBA determines that the stock or assets of an 8(a) applicant concern are held as community property, and if only one spouse demonstrates disadvantaged status, SBA shall require as a condition of demonstrating or maintaining eligibility, the transfer by the non-disadvantaged spouse or his/her ownership interest to the disadvantaged spouse. Such a transfer must be in an amount sufficient for the disadvantaged spouse to meet the minimum 51% unconditional ownership requirement for 8(a) program eligibility.

Example 1. Title to 8(a) applicant concern A is 100% in the name of Mrs. X (an individual determined to be socially and economically disadvantaged). Mr. X is a non-disadvantaged individual. Mr. and Mrs. X reside in a community property state and concern A is determined to be community property. By operation of law, Mr. X is deemed to own 50% of concern A. In order to meet 8(a) eligibility requirements, Mr. X would have to transfer 1% of his interest in concern A to Mrs. X as non-community property.

Example 2. Title to 8(a) applicant B is 51% in the name of Mr. Y (an individual determined to be socially and economically disadvantaged) and 49% in Mr. Z (an unmarried non-disadvantaged individual). Mrs. Y is a non-disadvantaged individual. Mr. and Mrs. Y reside in a community property state and concern B is determined to be community property. By operation of law, Mrs. Y is deemed to own 25.5% of concern B. In order to meet 8(a) eligibility requirements, Mrs. Y would have to transfer all 25.5% of her interest

in concern B to Mr. Y as non-community property.

14. Section 124.104 would be amended by revising the introductory text, paragraphs (a)(2) through (a)(4), paragraph (b), the introductory text of paragraph (c), paragraph (c)(2), and paragraph (d)(3) to read as follows:

§ 124.104 Control and management.

Except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations, as defined in § 124.100, an applicant concern's management and daily business operations must be conducted by an owner(s) of the applicant concern who has (have) been determined to be socially and economically disadvantaged. (See § 124.112 for the requirements for tribally-owned entities and those owned by ANCs). In the case of an applicant concern owned by a Native Hawaiian Organization, the concern's management and daily business operations must be conducted by one or more Native Hawaiian individuals. In the case of a concern owned by a Community Development Corporation, the concern's management and daily business operations must be conducted by one or more individuals determined to be socially and economically disadvantaged. In order for a disadvantaged individual to be found to control the concern, that individual must have managerial or technical experience and competency directly related to the primary industry in which the applicant concern is seeking certification. The application must demonstrate that the applicant concern is actually controlled and managed by one or more individuals determined to be socially and economically disadvantaged. A disadvantaged individual's unexercised right to cause a change in the control or management of the applicant concern does not satisfy this requirement, regardless of how quickly or easily the right could be exercised.

(a)(1) * * *

(2) An economically disadvantaged full-time manager must hold the position of President or Chief Executive Officer in the applicant or 8(a) concern.

(3) One or more disadvantaged individuals determined to manage the applicant or 8(a) concern on a full-time basis must be present and available during normal working hours at the place of business of the applicant or 8(a) concern.

(4) Any disadvantaged individual upon whom 8(a) eligibility is based who is engaged in the management and daily business operations of the 8(a) concern

and who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the written approval of SBA prior to engaging in such employment. SBA will review any request for outside employment for compliance with the requirement of day-to-day management and control of the 8(a) concern. SBA will deny a request for outside employment which could conflict with the management of the firm or could hinder it in achieving the objectives of its business development plan.

(b) The socially and economically disadvantaged individual(s) upon whom eligibility is based shall control the Board of Directors of an applicant or 8(a) concern, either in actual numbers of voting directors or through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the disadvantaged vote must be weighted—worth more than one vote—in order for the concern to be eligible for 8(a) participation).

(1) The powers to appoint, remove, and replace directors (e.g., through ownership of voting stock) is not sufficient to satisfy the requirement that one or more disadvantaged individuals actually control the Board of Directors.

(2) Non-voting, advisory, or honorary Directors may be appointed without affecting the control of the applicant or 8(a) concern to allow the firm to have a varied and experienced Board of Directors, provided they cannot negatively control the concern.

(3) All arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(c) Individuals who are not socially and economically disadvantaged may be involved in the management of an 8(a) applicant concern, and may be stockholders, partners, officers, and/or directors of such concern. Such partners, officers, directors, and/or more than 10 percent stockholders of the applicant concern, their spouses or immediate family members who reside in the individual's household may not however:

(2) Have an equity ownership interest of more than 10 percent in an applicant or 8(a) concern where such individual is an officer or director or more than a 20 percent owner, stockholder, or partner of another firm in the same or similar line of business as the applicant or 8(a) concern, except that a principal of a former Program Participant may have an

equity ownership interest of up to 20 percent in a current 8(a) concern in the same or similar lines of business as the former Program Participant.

* * * * *

(d) * * *

(3) The nondisadvantaged individual or entity provides critical financing or bonding support to the 8(a) concern which directly or indirectly allows the nondisadvantaged individual to gain control or direction of the 8(a) concern

* * * * *

15. Section 124.105(c)(1) would be amended by redesignating the second sentence and remaining text as paragraph (c)(2) and by revising paragraphs c)(1), introductory text of newly redesignated (c)(2) and newly redesignated paragraph (c)(2)(v) to read as follows:

§ 124.105 Social disadvantage.

* * * * *

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish his/her individual social disadvantage on the basis of clear and convincing evidence.

(2) A clear and convincing case of social disadvantage must include the following elements:

* * * * *

(v) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. SBA will entertain any relevant evidence in assessing this element. In every case, however, SBA will consider the experiences of the individual, where applicable, in education, employment and business history. Failure to establish disadvantage in any one of these components will not prevent an individual from meeting this requirement as long as the totality of the circumstances experienced by the individual demonstrates his/her disadvantage in entering into and/or advancing in the business world.

* * * * *

16. Section 124.106 would be amended by revising the last sentence of paragraph (a)(1)(i), by changing "\$250,000" to "\$300,000" in paragraph (a)(2)(i), by changing "\$750,000" to "\$900,000" in paragraph (b)(2), by revising the fifth sentence of paragraph (a)(2)(i)(A)(1), by revising paragraph (a)(2)(ii), and by revising paragraph (b)(1), introductory text, to read as follows:

§ 124.106 Economic disadvantage.

(a) *Economic disadvantage for the 8(a) program.*

(1)(i) * * * In determining economic disadvantage for purposes of 8(a) program eligibility, SBA will compare the applicant concern's business and financial profile with the profiles of other small business concerns in the same business area which are not owned and controlled by socially and economically disadvantaged individuals.

* * * * *

(2) * * *

(i) * * *

(A)(1) * * * Assets which an individual claiming disadvantaged status has transferred to a non-applicant immediate family member (or to a trust the beneficiary of which is an immediate family member) within two years of the date of application to the 8(a) program will be presumed to be the property of the individual claiming disadvantaged status for purposes of determining his/her personal net worth. However, such presumption shall not apply to transfers to a spouse who is subject to a legal separation recognized by a court of competent jurisdiction.

* * * * *

(ii) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other small concerns in the same business area which are not owned and controlled by socially and economically disadvantaged individuals. For purposes of this comparison, concerns in the same business area are those which are primarily engaged in the same four-digit Standard Industrial Classification (SIC) code. SBA will rely on published data showing business and financial profiles of similarly sized businesses operating within the same four-digit SIC code as the applicant, except where such data is not reasonably available. In such a case SBA may rely on published data pertaining to small business concerns in closely related four-digit SIC code(s) to derive the comparative profiles. In evaluating a concern's financial condition, SBA's consideration will include, but not be limited to, the following information: business assets, revenues, pre-tax profit, working capital, and net worth of the concern (including the value of the investments in the concern held by the individual claiming disadvantaged status).

* * * * *

(b) * * * (1) For purposes of the section 8(d) Subcontracting Program,

Small Disadvantaged Business set-asides, Small Disadvantaged Business Evaluation preferences, and other programs requiring SBA's determination of disadvantaged status, SBA will consider the same information and factors set forth in paragraph (a) of this section, but will apply standards to each factor that are less restrictive than those applied when determining economic disadvantage for purposes of the 8(a) program. This approach reflects the Congressional intent that partial or complete achievement of a concern's 8(a) program business development goals should not necessarily preclude its participation in other Federal procurement programs for concerns owned and controlled by socially and economically disadvantaged individuals.

(2) * * *

17. Section 124.107(b) would be revised to read as follows:

§ 124.107 Potential for success.

* * * * *

(b) In determining whether a concern has the requisite potential for success to be admitted into the 8(a) program, SBA will look at a number of factors including, but not limited to, the technical and managerial experience and competency of the applicant concern's managers and of the concern as a whole, the financial capacity of the applicant concern and the concern's record of performance on previous Federal and private sector contracts in the primary industry in which the concern is seeking 8(a) certification. While the individual(s) upon whom eligibility is based need not possess both management and technical capabilities pursuant to § 124.104, the applicant concern as a whole must demonstrate both technical know-how in the primary industry in which the concern is seeking 8(a) certification and management experience sufficient to run its day-to-day operations. SBA will examine each of these factors to determine whether an otherwise eligible applicant concern has the potential to successfully perform subcontracts awarded under the 8(a) program and to meet the business development objectives and goals of the program.

* * * * *

18. Section 124.108 would be amended by adding the following new paragraph (d)(3):

§ 124.108 Additional 8(a) program eligibility requirements.

* * * * *

(d) * * *

(3) An applicant concern seeking admission to the 8(a) program as a

regular dealer need not demonstrate that it is capable of meeting the requirements of the non-manufacturer rule (see 13 CFR 121.1106(b)) for its primary industry classification.

* * * * *

19. Section 124.109 would be amended by revising paragraphs (d) and (e), and by adding a new paragraph (f), to read as follows:

§ 124.109 Ineligible businesses.

* * * * *

(d) *Non-profit organizations.* A non-profit organization does not meet the general definition of a concern as set forth in part 121 and § 124.100 of these regulations and is, therefore, ineligible for 8(a) program participation. In addition, a business entity owned by a non-profit organization is not eligible for 8(a) program participation because such a concern does not meet the requirement of being owned and controlled by disadvantaged individuals. Nothing in this paragraph affects the eligibility of a for-profit concern owned and controlled by an Indian tribe, including an Alaskan Native Corporation, a Native Hawaiian Organization or a Community Development Corporation (see §§ 124.112, 124.113, and 124.114).

(e) *Concerns owned by other concerns.* An 8(a) applicant concern which is owned by another business concern, even where that "parent" concern is itself owned and controlled by disadvantaged individuals, may not be admitted to the 8(a) program because the applicant concern would not be owned by disadvantaged individuals. Nothing in this section is intended to affect the eligibility of joint ventures for specific 8(a) procurement requirements that are authorized pursuant to § 124.321.

(f) *Parole or probation.* An applicant to the 8(a) program is ineligible for program participation if the proprietor, or a holder of at least 20 percent of the stock, or a partner, officer, director, or other persons, including hired managers, who have or will have the authority to speak for and commit the concern in the management of its business affairs, is currently incarcerated, on parole or on probation either pursuant to a pre-trial diversion or following conviction of a serious offense.

20. Section 124.110 would be amended by revising the first three sentences of paragraph (a) and by revising paragraph (b) to read as follows:

§ 124.110 Program term.

(a) Each concern certified for participation in the 8(a) program shall

receive a Program Term of nine years from the date of such certification. The term will consist of two stages: the developmental stage, which lasts four years, and the transitional stage, which lasts five years. These stages are described in § 124.303. * * *

(b) Once a Program Term has been established in accordance with this section, SBA is statutorily prohibited from extending such term beyond the specified expiration date.

21. Section 124.111 would be amended by revising paragraphs (a)(2) and (c)(5) to read as follows:

§ 124.111 Continued 8(a) program eligibility.

(a) * * *

(2) In order for a Program Participant to maintain continued 8(a) program eligibility, the net worth of an individual claiming to be socially and economically disadvantaged cannot exceed \$900,000, as calculated pursuant to § 124.106(a)(2)(i). An individual whose personal net worth exceeds \$900,000, as calculated pursuant to § 124.106(a)(2)(i), will not be considered economically disadvantaged.

* * *

(c) * * *

(5) If SBA determines, pursuant to paragraph (c)(4) of this section, that funds or assets have been withdrawn to the detriment of the achievement of the targets, objectives and goals of the Participant's business plan, or to the detriment of its overall business development, SBA shall initiate a termination proceeding under § 124.209 or shall require an appropriate reinvestment of funds or other assets and such other actions as SBA may deem necessary to counteract the detrimental withdrawals as a condition of maintaining 8(a) program eligibility. The mere fact that a concern's net worth has increased despite withdrawals that are deemed excessive will not preclude SBA from determining that such withdrawals were detrimental to the attainment of the concern's business objectives or to its overall business development.

* * *

22. Section 124.112 would be amended by revising paragraphs (c)(2)(iv)(A) through (C) to read as follows:

§ 124.112 Concerns owned by Indian tribes, including Alaska Native Corporations.

* * *

(c) * * *

(2) * * *

(iv) During its Program Term, a tribally-owned Program Participant

may, for up to five 8(a) contracts, be a party to a joint venture which exceeds the applicable size standard, if the tribally-owned Program Participant:

(A) Owns and controls 51 percent or more of the joint venture;

(B) Is located on the reservation of or land owned by the tribe;

(C) Performs most of its activities generally on such reservation or tribally-owned land; and

(D) * * *

* * *

23. Section 124.113 would be amended by redesignating the current text as paragraph (a) and by adding the following new paragraphs (b) through (d) to read as follows:

§ 124.113 Concerns owned by Native Hawaiian Organizations.

(a) * * *

(b) A concern owned by a Native Hawaiian Organization must qualify as a small business concern as defined for purposes of Government procurement in part 121 of this title. The particular size standard to be applied shall be based on the primary industry classification of the applicant concern. Ownership by the Native Hawaiian Organization will not, in and of itself, cause affiliation with the Native Hawaiian Organization or with other entities owned by the Native Hawaiian Organization. However, affiliation with the Native Hawaiian Organization or with other entities owned by the Native Hawaiian Organization may be caused by circumstances other than common ownership.

(c) No Native Hawaiian Organization shall own more than one current or former 8(a) Program Participant having the same primary industry classification.

(d) SBA does not deem an individual involved in the owned by the Native Hawaiian Organization to have used his or her individual eligibility within the meaning of § 124.108(c).

24. A new section 124.114 would be added to read as follows:

§ 124.114 Concerns owned by Community Development Corporations.

(a) Concerns owned by Community Development Corporations (CDCs) as defined in § 124.100 are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in §§ 124.102 through 124.109 and § 124.111(a) of this part.

(b) A concern owned by a CDC must qualify as a small business concern as

defined for purposes of Government procurement in part 121 of this title. The particular size standard to be applied shall be based on the primary industry classification of the applicant concern. Ownership by the CDC will not, in and of itself, cause affiliation with the CDC or with other CDC-owned entities. However, affiliation with the CDC or other CDC-owned entities may be caused by circumstances other than common CDC ownership.

(c) No CDC shall own more than one current or former 8(a) Program Participant having the same primary industry classification.

(d) SBA does not deem an individual involved in the management or daily business operations of a CDC-owned concern to have used his or her individual eligibility within the meaning of § 124.108(c).

§ 124.201 [Amended]

25. Section 124.210 would be amended by removing the second sentence.

26. Section 124.202 would be amended by revising the last sentence and by adding a new sentence at the end of the section to read as follows:

§ 124.202 Place of filing.

* * * An 8(a) application will be processed by the appropriate SBA field office of the Certification and Eligibility Branch. A request for reconsideration shall be made directly to the AA/MSB&COD at 409 Third Street, S.W., Washington, DC, 20416.

27. Section 124.206 would be amended by removing the first two sentences of paragraph (a), by adding four sentences to the beginning of paragraph (a) and one sentence to the end of paragraph (a), by removing the first two sentences of paragraph (c)(1), and by adding three sentences to the beginning of paragraph (c)(1) to read as follows:

§ 124.206 Approval and decline of applications for 8(a) program admission.

(a) *General.* The AA/MSB&COD is authorized to approve or decline applications for admission to the 8(a) program. The decision of the AA/MSB&COD to approve or decline an application shall be based on whether the application demonstrates that an applicant concern complies with each of SBA's eligibility criteria at the time of the application or at the time of any request for reconsideration. A denial of program admission based on a finding that the individual(s) claiming social and economic disadvantage is (are) not socially and/or economically disadvantaged and/or that such

individual(s) does (do) not own and/or does (do) not control the applicant concern, may be appealed to SBA's Office of Hearings and Appeals (OHA). Any such appeal must be based upon the circumstances which existed and were disclosed to SBA at the time the application or request for reconsideration was forwarded to SBA's Central Office for processing. * * * Incomplete application packages will not be processed. The appropriate field office shall notify the applicant concern when it has forwarded the application to SBA's Central Office of a final decision.

(b) * * *

(c) *Decline.* * * *

(1) *Reconsideration.* Every applicant has the right to request that the AA/MSB&COD reconsider his/her decline decision. Such request must be made in writing by certified mail, return receipt requested, within 45 days of the date the decline letter is mailed. The decline letter shall inform the applicant to whom a request for reconsideration must be made. As part of the reconsideration request, the applicant should include any additional information and documentation pertinent to overcoming the reason(s) for the initial decline. * * *

(2) * * *

28. Section 124.208 would be amended by removing paragraph (c)(2), by redesignating paragraph (c)(3) as paragraph (c)(2), and by revising newly redesignated paragraph (c)(2) to read as follows:

§ 124.208 Program graduation.

(c) * * *

(2) *Recommendation of the Division.* Following the 45 day response period, the Division Director will consider the facts of the proposed graduation, including all information submitted by the Participant. The Division Director shall make a recommendation in writing, as to whether or not graduation is appropriate, to the AA/MSB&COD within 45 days of the close of the response period. If he/she seems it necessary, the Division Director may request additional information from the Participant.

29. Section 124.209 would be amended by removing paragraph (b)(2), by redesignating paragraph (b)(3) as paragraph (b)(2), and by revising newly redesignated paragraph (b)(2) to read as follows:

§ 124.209 Program termination.

* * *

(b) * * *

(2) *Recommendation of the Division.*

Following the 45 day response period, the Division Director will have 45 days to consider the facts of the proposed termination, including all information submitted by the Participant. The Division Director may, if he/she deems it necessary, request additional information from the Participant. If the grounds for the proposed termination continue to exist, the Division Director shall recommend in writing to the AA/MSB&COD that the Participant be terminated.

30. Section 124.210 would be amended by revising paragraph (h)(2) and adding the following new paragraph (k) at the end as follows:

§ 124.210 Appeals to SBA's Office of Hearings and Appeals.

* * *

(h)(1) * * *

(2) If the Administrative Law Judge determines that, due to the absence in the written administrative record of the reasons upon which the determination in question was based, such administrative record is insufficiently complete to decide whether the determination is arbitrary and capricious or contrary to law, the case shall be remanded by the Administrative Law Judge to the AA/MSB&COD for further consideration in accordance with the terms of such remand. The AA/MSB&COD shall issue a revised decision in accordance with the remand order within 10 working days of the remand, unless the AA/MSB&COD requests and the Administrative Law Judge grants an extension thereof. An applicant or 8(a) concern may appeal the AA/MSB&COD's remand decision to OHA within 20 working days of the date that the decision is mailed. The failure of an applicant to file an appeal within the 20-day time frame would serve to make the remand decision the final agency decision and would not require any further action by OHA.

(3)(i) * * *

(k)(1) At any time after a written decision has been issued and upon notice to all parties to the proceeding, the Administrative Law Judge may, on his/her own initiative, reopen the proceeding and enter a new decision confirming, modifying, or setting aside the decision in whole or in part.

(2) Within 20 calendar days after the issuance of a written decision and upon notice to all parties to the proceeding, any party may file a petition for reconsideration of such decision. Such a petition may be granted only where it

establishes a clear error of law or fact of decisional significance.

31. Section 124.302 would be amended by revising paragraphs (c)(1)(i)(A) and (c)(2) to read as follows:

§ 124.302 Review and modification of business plan.

* * *

(c) *Changes in SIC code designations.*

(1) * * * (i)(A) A sound business explanation exists for obtaining the requested SIC code, including, for example, the acquisition of the capability to perform contracts in an industry, even if unrelated to the 8(a) concern's primary SIC code;

(B) * * *

* * *

(2) SBA will make a decision on such request within 30 days from the date it receives the request.

* * *

32. Section 124.303 would be amended by removing the first two sentences of paragraph (a) and by adding two sentences to the beginning of paragraph (a) to read as follows:

§ 124.303 Stages of 8(a) program participation.

(a) *General.* Program participation is divided into two stages, a developmental stage and a transitional stage. The developmental stage shall be four years and the transitional stage shall be five years unless the Participant has exited the program by one of the means set forth in § 124.110. * * *

§ 124.303 [Amended]

33. Section 124.303 would be further amended by removing paragraph (b), redesignating paragraph (c) as paragraph (b), by removing paragraph (b)(3) of newly redesignated paragraph (b), and by redesignating paragraphs (b) (4) through (7) of newly redesignated paragraph (b) as paragraphs (b) (3) through (6).

34. Section 124.304 would be removed and reserved as follows:

§ 124.304 [Reserved]

35. Section 124.305 would be amended by revising paragraphs (b)(3) and (c)(4) to read as follows:

§ 124.305 Statutory exemptions from the Miller Act bond requirements.

* * *

(b) * * *

(3) The Participant must demonstrate that it cannot obtain a bond for the performance of the 8(a) procurement by submitting to SBA a written denial from a corporate (Treasury-listed) surety.

* * *

(c) * * *

(4) No Program Participant may receive an exemption to the Miller Act bonding requirements under this section if it is currently performing two 8(a) contracts for which such a bond exemption was granted.

* * * * *

36. Section 124.307 would be amended by redesignating paragraph (d) as paragraph (e), by adding the following new paragraph (d), and by adding the following new paragraph (f):

§ 124.307 Contractual assistance.

* * * * *

(d) While a Program Participant's projected level of 8(a) contract support is required as part of its business plan under § 124.302(b) as a planning and development tool, the level approved by SBA will not act as a bar to contract awards above that level so long as SBA determines the concern to be competent and responsible to perform any such contracts and the Participant is in compliance with any applicable competitive business mix requirement imposed by § 124.312.

* * * * *

(f)(1) The eligibility of a Program Participant, including its status as a small business, for a sole source or competitive 8(a) requirement may not be challenged by another Program Participant or any other party to SBA or to any other administrative forum as part of a bid or other contract protest.

(2) The SIC code assigned to a sole source or competitive 8(a) requirement may not be challenged by another Program Participant or any other party to SBA or to any other administrative forum as part of a bid or other contract protest. Pursuant to § 121.1703(b), only the AA/MSB&COD may appeal a SIC code designation with respect to a sole source or competitive 8(a) requirement, and such appeal, if initiated in the discretion of the AA/MSB&COD, shall be made to OHA.

(3) Anyone with information concerning the eligibility of a Program Participant to continue participation in the 8(a) program may submit such information to SBA in accordance with § 124.111(c). Similarly, anyone with information concerning the size eligibility of a Program Participant for purposes of a specific 8(a) contract may submit such information to the appropriate SBA field office for consideration. See §§ 121.1104(b)-(d).

37. Section 124.308 would be amended by revising the introductory text of paragraph (c), revising paragraph (d), the first sentence of paragraph (f)(1), paragraph (f)(2), the first sentence

of paragraph (g), and by adding a new paragraph (i), to read as follows:

§ 124.308 Procedures for obtaining and accepting procurements for the 8(a) program.

* * * * *

(c) *Offering letter.* All requirements that are offered to the 8(a) program as competitive procurements and those sole source requirements that are offered to the program without nominating a specific Program Participant (i.e., open requirements) should be offered to SBA's Division of Program Development, 409 Third Street SW., Washington, DC 20416. Sole source requirements that are offered to the 8(a) program on behalf of a specific Program Participant should be offered to the appropriate SBA district office. When a requirement is offered to the 8(a) program, the offering letter or notification from the procuring agency shall contain the following information:

* * * * *

(d) *Acceptance of the requirement.* Upon receipt of the procuring agency's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) program. SBA's decision whether to accept the requirement will be transmitted to the procuring agency in writing within 15 working days of receipt of the written offering letter, unless SBA requests, and the procuring agency grants, an extension. SBA is not required to accept any particular procurement offered to the 8(a) program.

(1) Where SBA decides to accept an offering of a sole source 8(a) procurement, SBA will accept the offer both on behalf of the program and in support of the approved business plan of a specific 8(a) Program Participant.

(2) Where SBA decides to accept an offering of a competitive 8(a) procurement, SBA will accept the offer for the 8(a) program generally.

(3) SBA will not accept a requirement as a competitive 8(a) procurement where a competition has been conducted by a procuring agency prior to SBA's formal acceptance of the requirement for the 8(a) program and the procuring agency seeks SBA's acceptance in order to select an apparent successful offeror and/or transmit a contract to SBA for execution. Such a competition conducted without obtaining SBA's formal acceptance of the procurement requirement for the 8(a) program will not be considered an 8(a) competitive requirement. In such a case, SBA may accept the requirement for the 8(a) program as a competitive 8(a) requirement, but the procuring agency

would be required to use appropriate competition procedures again, including issuing a new solicitation.

(4) Except for requirements assigned a construction SIC code by the procuring agency contracting officer, all competitive 8(a) requirements accepted by SBA may be competed among all eligible 8(a) Program Participants nationally. The only geographic restrictions pertaining to 8(a) competitive requirements, other than those for construction requirements, would be those imposed by the solicitations themselves.

* * * * *

(f) Open requirements. * * *

(1) If the procurement is a construction requirement, SBA will examine the portfolio of 8(a) concerns for the SBA district office where the work is to be performed for selection of a qualified 8(a) concern. * * *

(2) If the procurement is anything other than a construction requirement, SBA may select any eligible, responsible Program Participant nationally to perform the contract.

(3) * * *

* * * * *

(g) Formal technical evaluations.

Except for the procedures prescribed by subpart 36.6 of the Federal Acquisition Regulations for architect-engineer services, SBA will not authorize formal technical evaluations for sole source 8(a) procurement requirements. * * *

* * * * *

(i) Basic Ordering Agreements (BOAs).

(1) For purposes of the 8(a) program, a Basic Ordering Agreement (BOA) is not an 8(a) contract award. Each order to be issued under the BOA is an individual contract. As such, there must be a separate offer and acceptance of each BOA order before it may be issued through the 8(a) program as an 8(a) contract award. The 8(a) Participant must be eligible to receive each new order at the time of the order. For example, a concern's size status does not relate back to the time that the BOA was executed. Instead, a concern must be small at the time of the issuance of each new order.

(2) Once a concern's term of program participation expires, or the concern otherwise exits the 8(a) program, new orders cannot be issued through the 8(a) program because the concern is no longer eligible to receive new 8(a) awards.

§ 124.308 [Amended]

38. Section 124.308 would be further amended by removing the words "approved 8(a) business support level of the" contained in paragraph (e)(1)(iii).

39. Section 124.309(c) would be revised to read as follows:

§ 124.309 Barriers to acceptance.

(c) *Adverse Impact.* SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs. The adverse impact concept is designed to protect small business concerns which are performing or are seeking to perform Government contracts awarded outside the 8(a) program.

(1) In determining whether or not the acceptance of a requirement would have an adverse impact on an individual small business, SBA will consider all relevant factors.

(i) In connection with an individual small business, SBA presumes adverse impact to exist when a small business concern has performed a specific requirement for at least 24 months, it is performing the requirement at the time it is offered to the 8(a) program or its performance of the requirement ended within 30 days of the procuring agency's offer of the requirement to the 8(a) program, and the dollar value of the requirement that the small business was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates).

(ii) Except as provided in paragraph (c)(2) of this section, adverse impact does not apply to "new" requirements. A new requirement is a requirement which has not been previously procured by the relevant procuring agency. Where a requirement is new, no small business could have performed the requirement and, thus, an impact determination need not be performed. Construction contracts by their very nature (e.g., the one-time building of a specific structure) are new requirements. The expansion or alteration of an existing requirement shall be considered a new requirement where the requirement is materially expanded or modified so that the ensuing requirement is not substantially similar to the prior requirement due to the magnitude of the expansion or alteration.

(2) In determining whether or not the acceptance of a requirement would have an adverse impact on a group of small businesses located in a specific geographical location, SBA shall consider the effects of a procuring agency bundling various requirements being performed by two or more small business concerns into a larger contract which would be considered a "new"

requirement because of the magnitude of its expansion as compared to any of the previous smaller requirements. In such a case, adverse impact may be found if one of the small business concerns meets the presumption set forth in paragraph (c)(1)(i) of this section.

(3) In determining whether or not the acceptance of a requirement would have an adverse impact on other small business programs, SBA will consider all relevant factors, including but not limited to, whether or not SBA's acceptance of a proposed 8(a) requirement is likely to result in SBA taking an inordinate portion of total procurements in the subject industry to the detriment of the small business set-aside program.

§ 124.309 [Amended]

40. Section 124.309 would be further amended by revising the phrase "a sole source 8(a) contract" in paragraph (d) to read "an 8(a) contract."

41. Section 124.311(a)(2) is amended by removing the following sentence from the end:

"For purposes of indefinite quantity/delivery contracts, the thresholds will be applied to the guaranteed minimum value of the contract."

42. Section 124.311 would be further amended by removing paragraphs (b) and (g), by redesignating paragraphs (c), (d), (e), (f), (h) and (i) as paragraphs (b), (c), (d), (e), (f) and (g), respectively, by adding a new paragraph (a)(3), and by revising newly redesignated paragraphs (d)(1), (d)(2), (f)(3), (f)(4), and (g) to read as follows:

§ 124.311 8(a) competition.

(a) * * *

(3) For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring agency estimate of the total value of the contract, including all options.

* * * * *

(d) *Sole source above thresholds.*

* * *

(1) SBA will not accept a construction requirement above the competitive threshold amount as a sole source 8(a) requirement.

(2) For purposes of any requirement other than a construction requirement, SBA will accept a contract opportunity above the applicable competitive threshold as a sole source 8(a) requirement only if there are not two eligible offerors in the United States capable of performing the requirement at a fair price.

* * * * *

(f) *Restricted competition.* (1) * * *

* * * * *

(3) *Construction competitions.* Where a construction requirement offered to the 8(a) program exceeds the \$3 million competitive threshold, SBA will determine, based on its knowledge of the 8(a) portfolio, whether the competition should be limited only to those Program Participants located within the geographical boundaries of one or more SBA district offices, an entire SBA regional office, or adjacent SBA regional offices. Only those Participants located within the appropriate geographical boundaries are eligible to submit offers.

(4) *Competition for all non-construction requirements.* Except for construction requirements, all eligible Program Participants nationally may submit offers in response to solicitations for procurement requirements offered to the 8(a) program that exceed the applicable competitive threshold.

(g) *Award to firms whose program terms have expired.* A concern that has completed its term of participation in the 8(a) program, as set forth in § 124.110, may be awarded a competitive 8(a) contract if it was a Program Participant eligible for award of the contract on the date specified for receipt of offers contained in the contract solicitation.

(1) For a negotiated procurement, so long as a Program Participant is eligible as of the date specified for the receipt of offers in the solicitation, its program term may expire after that date without affecting the concern's eligibility to submit revised offers, including a best and final offer, and receive a competitive award.

(2) Eligibility is determined as of the initial date specified for the receipt of offers set forth in the solicitation without regard to extensions of time through amendments to the solicitation.

(3) This provision applies equally to all 8(a) procurement requirements, including construction requirements.

(4) An 8(a) procurement requirement for architect-engineer services, in an amount less than the competitive threshold set forth in § 124.311(a), that uses the evaluation procedures prescribed by subpart 36.6 of the Federal Acquisition Regulation will not be considered a competitive 8(a) requirement under this section for which a firm whose program term has expired may be eligible.

43. Section 124.311 would be further amended by removing the phrase "business support level and" in newly redesignated paragraph (e)(4), by adding the word "and" after the semi-colon

(";" in newly redesignated paragraph (e)(5)(iii), by removing newly redesignated paragraph (e)(5)(iv) in its entirety, by redesignating paragraph (e)(5)(v) as paragraph (e)(5)(iv), and by revising newly redesignated paragraph (e)(5)(iv) to read as follows:

§ 124.311 8(a) competition.

* * * * *

(iv) If the firm is in the transitional stage of program participation, whether it has achieved its competitive business mix targets under § 124.312, or is in compliance with a remedial plan that does not include the denial of future 8(a) contracts.

§ 124.312 [Amended]

44. Section 124.312 would be amended by removing paragraphs (b)(4), (b)(5), and (b)(6) and by redesignating paragraph (b)(7) as paragraph (b)(4).

45. Section 124.312 would be further amended by removing paragraphs (c)(2), (c)(3), and (c)(9) and by redesignating paragraphs (c)(4), (c)(5), (c)(6), (c)(7), (c)(8), (c)(10), (c)(11), and (c)(12) as paragraphs (c)(2), (c)(3), (c)(4), (c)(5), (c)(6), (c)(7), (c)(8), and (c)(9), respectively.

46. Section 124.317 would be amended by revising paragraph (b)(3), and by adding a sentence at the end of paragraph (c) to read as follows:

§ 124.317 Performance of contracts by original 8(a) concern.

* * * * *

(b) * * * (3) The individuals upon whom eligibility was based are no longer able to exercise control of the concern due to physical or mental incapacity or death; and

* * * * *

(c) * * * The burden is on the concern requesting a waiver to specify the ground(s) upon which the waiver is being sought and to demonstrate that it has met that (those) ground(s).

* * * * *

47. Section 124.319 would be amended by adding a new paragraph (c) to read as follows:

§ 124.319 Contract termination.

* * * * *

(c) *Substitution of one 8(a) contractor for another.* Where a Program Participant is unable to complete performance of an 8(a) contract, SBA may authorize another 8(a) Participant to complete performance and, in conjunction with the procuring agency, novate the contract to the substitute Program Participant.

48. Section 124.321 would be amended by revising the second sentence of paragraph (a), by adding a new sentence after the second sentence of paragraph (a), by revising paragraphs (c)(3), (d)(2), (d)(3), and (h)(1)(iii), and by adding a new paragraph (i) to read as follows:

§ 124.321 Joint venture agreements.

(a) *Prerequisites for joint venture agreement.* * * * A joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, and when the agreement is fair and equitable. Where an 8(a) concern brings nothing to the joint venture relationship (i.e., it lacks the management, technical, and financial capacity to perform the contract), the joint venture arrangement will not be approved by SBA.

* * * * *

(b) * * * (c) *Contents of joint venture agreement.* * * *

(3) A provision stating that not less than 51 percent of the net profits earned by the joint venture shall be distributed to the 8(a) concern. In the case of a joint venture that includes two or more 8(a) concerns, no one 8(a) concern is individually required to receive 51 percent of the profits (e.g., there can be a 50/50 joint venture relationship between two 8(a) concerns).

* * * * *

(d) *Other requirements.* * * * (1) * * *

(2) An 8(a) concern to the joint venture arrangement must be designated as the lead entity of the joint venture. An employee of the 8(a) concern designated as the lead entity must be appointed project manager responsible for contract performance.

(3) Accounting and other administrative records relating to the joint venture shall be kept in the office of the lead 8(a) concern, unless approval to keep them elsewhere is granted by SBA upon written request. Upon completion of the contract performed by the joint venture, the final original records shall be retained by the lead 8(a) concern.

* * * * *

(h) *Joint ventures with concerns owned by Indian tribes.* (1) * * *

* * * * *

(iii) Performs most of its activities generally on such reservation or tribally-owned land; and

* * * * *

(i) *Joint ventures for Small Disadvantaged Business Set-Asides and Small Disadvantaged Business*

Evaluation Preferences. Joint ventures are permitted for Small Disadvantaged Business (SDB) set-asides and SDB evaluation preferences, provided that the requirements set forth in this paragraph are met.

(1) For purposes of this paragraph, the term joint venture has the same meaning as that set forth in § 121.401(1) of these regulations. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible as an entity owned and controlled by one or more socially and economically disadvantaged individuals.

(2) A concern that is owned and controlled by one or more socially and economically disadvantaged individuals entering into a joint venture agreement with one or more other business concerns is considered to be affiliated for size purposes with such other concern(s). The combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the SIC code designated for the contract.

(3) The majority of the venture's earnings must accrue directly to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture.

(4) The percentage ownership involvement in a joint venture by disadvantaged individuals must be at least 51 percent.

Example 1. Small business concern A is 100% owned by disadvantaged individuals. Small business concern B is 100% owned by nondisadvantaged individuals. The percentage involvement by concern A in a joint venture between A and B must be at least 51%.

Example 2. Small business concern C is 51% owned by disadvantaged individuals. Small business concern D is 100% owned by nondisadvantaged individuals. Any joint venture between C and D would be ineligible because the amount of ownership involvement in such a joint venture by disadvantaged individuals would be less than 51%. Even a 90% involvement by concern C in a joint venture with D would mean an overall ownership involvement by disadvantaged individuals of only 45.9% (51% of 90), and an overall ownership involvement by nondisadvantaged individuals of 54.1% (10 + (49% of 90)).

49. Section 124.501 would be amended by redesignating paragraph (c) as paragraph (d) and by adding the following new paragraph (c):

§ 124.501 Miscellaneous reporting requirements.

(c) *Submission of financial statements.* (1) Program Participant with actual gross annual receipts of \$5,000,000 or more must submit to SBA audited annual financial statements prepared by a licensed independent public accountant (as defined in part 107, Appendix I, ¶ II. B) within 120 days after the close of the concern's fiscal year.

(i) Upon request by the Program Participant, SBA may waive the requirement for audited financial statements. Waivers under this paragraph may be granted by the appropriate District Director only for the first year the audited financial statements are required. Beyond such first year, only the AA/MSB&COD may waive this requirement for good cause shown by the Program Participant.

(ii) Circumstances where waivers of audited financial statements may be granted include, but are not limited to, the following: (A) the concern has an unexpected increase in sales towards the end of its fiscal year that creates an unforeseen requirement for audited statements; (B) the concern unexpectedly experiences severe financial difficulties which would make the cost of audited financial statements a particular burden; and (C) the concern has been an 8(a) Program Participant less than 12 months.

(2) Program Participants with actual gross annual receipts of \$1,000,000 to \$4,999,999 shall submit to SBA reviewed annual financial statements prepared by a licensed independent public accountant (as defined in part 107, Appendix I, ¶ II. B) within 90 days after the close of concern's fiscal year.

(3) Program Participants with actual gross annual receipts of less than \$1,000,000 shall submit to SBA an annual statement prepared in-house or compilation statement prepared by a licensed independent public accountant (as defined in part 107, Appendix I, ¶ II. B), verified as to accuracy by an authorized officer, partner, or sole proprietor of the 8(a) concern, by signature and date, within 90 days after the close of the concern's fiscal year.

(4) Any audited financial statements submitted to SBA pursuant to § 124.501(c) shall be prepared in accordance with Generally Accepted Accounting Principles and reflect the independent public accountant's opinion.

(5) While financial statements need not be submitted until 90 or 120 days after the close of an 8(a) concern's fiscal year, depending on the receipts of the

concern, every 8(a) concern must submit a final sales report signed by the CEO or President to SBA within 10 working days of the end of its fiscal year in order for SBA to determine/verify the concern's size for 8(a) contract awards and compliance with competitive business mix targets. This report must show a breakdown of 8(a) and non-8(a) sales.

(6) Audited or reviewed annual and/or quarterly statements may be required when SBA determines it is necessary to obtain a more thorough verification of a concern's assets, liabilities, income and/or expenses, or to determine the concern's capacity to perform a specific 8(a) contract.

(7) The requirements for submitting financial statements also apply to 8(a) joint venture agreements.

50. The following new § 124.611 would be added to read as follows:

§ 124.611 Availability of Small Disadvantaged Business status decisions.

(a) Any SDB status decision issued pursuant to § 124.609 or § 124.610 of these regulations shall

(1) be made available to the protester, the protested party, the contracting officer, and all other parties to the proceeding in full text; and

(2) be published in full text in SBA's law library, 409 3rd Street, SW., 7th Floor, Washington, DC, 20416, and be made available for inspection upon request.

(b) Any SDB status decision shall include findings of fact and conclusions of law, with specific reasons supporting such findings and conclusions, upon each material issue of fact and law of decisional significance regarding the disposition of the case.

Dated: July 28, 1994.

Erskine B. Bowles,
Administrator.

[FR Doc. 94-21217 Filed 8-29-94; 8:45 am]
BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Ch. I**

[Summary Notice PR-94-18]

Petition for Rulemaking; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for rulemaking received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for rulemaking (14 CFR part 11), this notice contains a summary of certain petitions requesting the initiation of rulemaking procedures for the amendment of specified provisions of the Federal Aviation Regulations and of denials or withdrawals of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received October 31, 1994.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket No. 800 Independence Avenue, SW., Washington, DC 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-200), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-3132.

FOR FURTHER INFORMATION CONTACT: Mr. D. Michael Smith, Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-7470.

This notice is published pursuant to paragraphs (b) and (f) of § 11.27 of part 11 of the Federal Aviation Regulations (14 CFR part 11).

Issued in Washington, DC., on August 24, 1994.

Donald P. Byrne,
Assistant Chief Counsel for Regulations.

Petitions for Rulemaking

Docket No.: 27817

Petitioner: Mr. Danilo Floreani

Regulations Affected: 14 CFR 61.197

Description of Rulechange Sought: To allow a Certified Flight Instructor renewal to be granted to a military pilot with a favorable record of instruction, or to a military flight examiner.

Petitioner's Reason for the Request: The petitioner states that there is no provision for renewal of the CFI certificate based on instruction given during military operations. The