

Housing Enterprise Oversight hereby amends 12 CFR part 1780 as follows:

**PART 1780—RULES OF PRACTICE AND PROCEDURE**

■ 1. The authority citation for part 1780 is revised to read as follows:

**Authority:** 12 U.S.C. 4501, 4513(b), 4517, 4521, 4631–4641.

■ 2. Revise Subpart E of part 1780 to read as follows:

**Subpart E—Civil Money Penalty Inflation Adjustments**

**§ 1780.80 Inflation adjustments.**

The maximum amount of each civil money penalty within OFHEO’s jurisdiction is adjusted in accordance

with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (28 U.S.C. 2461 note) as follows:

U.S. code citation	Description	New adjusted maximum penalty amount
12 U.S.C. 4636(b)(1)	First Tier	6,500
12 U.S.C. 4636(b)(2)	Second Tier (Executive Officer or Director)	11,000
12 U.S.C. 4636(b)(2)	Second Tier (Enterprise)	32,500
12 U.S.C. 4636(b)(3)	Third Tier (Executive Officer or Director)	130,000
12 U.S.C. 4636(b)(3)	Third Tier (Enterprise)	1,275,000

**§ 1780.81 Applicability.**

The inflation adjustments in § 1780.80 apply to civil money penalties assessed in accordance with the provisions of 12 U.S.C. 4636 for violations occurring after the effective date, August 30, 2005.

Dated: August 25, 2005.

**Stephen A. Blumenthal,**

*Acting Director, Office of Federal Housing Enterprise Oversight.*

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**BILLING CODE 4220–01–U**

**SMALL BUSINESS ADMINISTRATION**

**13 CFR Parts 121, 124, 125 and 126**

**RIN 3245–AF31**

**HUBZone, Government Contracting, 8(a) Business Development and Small Business Size Standard Programs**

**AGENCY:** U.S. Small Business Administration (SBA).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This interim rule amends SBA’s HUBZone, 8(a) Business Development, Government Contracting and Size Standard regulations to implement provisions of the Small Business Act including the Consolidated Appropriations Act, 2005, specifically, Subtitle E of Division K entitled the Small Business Reauthorization and Manufacturing Assistance Act of 2004. Consistent with the new statutory requirements under Subtitle E, this interim rule: Amends the definitions of the terms “business concern,” “affiliation,” “HUBZone small business concern” and “qualified HUBZone small business concern;” amends the HUBZone eligibility requirements for tribally-owned

HUBZone concerns; extends qualified HUBZone areas to include military base closure areas for a period of five years; revises the definition of a “qualified non-metropolitan county;” extends the redesignation period for HUBZone areas through the release of the 2010 census data; and provides a five percent HUBZone evaluation price preference for agricultural commodities in international food aid procurements. Pursuant to the Administrative Procedure Act, SBA has determined that there is good cause to issue this rule as an interim rule with an immediate effective date. However, SBA encourages and will consider all timely public comments in developing the final rule.

**DATES:** This interim rule is effective August 30, 2005. Comments must be received on or before October 31, 2005.

**ADDRESSES:** You may submit comments, identified by RIN #3245–AF31, by any of the following methods:

Internet: <http://www.regulations.gov>. Follow the instructions for submitting comments. E-mail: [hubzone@sba.gov](mailto:hubzone@sba.gov). Fax: (202) 481–5593.

Mail or Hand Deliver: Michael McHale, Associate Administrator for the HUBZone Program, 409 Third Street, SW., Washington, DC, 20416.

**FOR FURTHER INFORMATION CONTACT:** Sheryl J. Swed, Office of Government Contracting, at (202) 205–6413 or by e-mail at: [sheryl.swed@sba.gov](mailto:sheryl.swed@sba.gov).

**SUPPLEMENTARY INFORMATION:**

**A. Statutory Authority**

On December 8, 2004, the President signed into law the Consolidated Appropriations Act, 2005, Public Law 108–447 which contained the Small Business Reauthorization and Manufacturing Assistance Act of 2004 (the Reauthorization Act). Subtitle E of

the Reauthorization Act amended certain provisions of the Small Business Act, 15 U.S.C. 631 *et. seq.*, that govern the HUBZone program and the definition of small agricultural cooperative.

*1. Section 151 of the Reauthorization Act*

In particular, Section 151 of the Reauthorization Act relaxed the statutory requirement that a HUBZone small business concern (SBC) must be entirely owned by U.S. citizens. Congress concluded that this statutory mandate precluded small business owners from taking advantage of available forms of business organizations that limit the personal liability of business owners. It also precluded ownership by small agricultural cooperatives that operate in rural HUBZones, and thereby deprived those communities of the economic benefits of increased HUBZone contracting opportunities.

As a result, Section 151 of the Reauthorization Act amended the definition of “HUBZone SBC” in section 3(p)(3)(A) of the Small Business Act, 15 U.S.C 632(p)(3)(A), to require that SBCs eligible for HUBZone certification be 51 percent (instead of 100 percent) owned and controlled by U.S. citizens. It also added a new section 3(p)(3)(E) to the Small Business Act, 15 U.S.C 632(p)(3)(E), to include as HUBZone SBCs small agricultural cooperatives or SBCs wholly or partially-owned by small agricultural cooperatives organized and incorporated in the United States. Also in connection with agricultural cooperatives, Section 151 further amended Section 3(j) of the Small Business Act, 15 U.S.C. 632(j), to require that small agricultural cooperatives be treated as business concerns for purposes of the Small

Business Act. This section also states that when determining size, SBA should not include the income or employees of the underlying members of the cooperative. Because SBA's programs and services were created for the benefit of the small business community, SBA interprets this section to mean that the members of any small agricultural cooperative applying for SBA assistance must also qualify as a small business concern or small agricultural cooperative in order to qualify for SBA assistance. To interpret the statute otherwise would circumvent the Agency's mission.

In addition, Section 151 of the Reauthorization Act expanded the employee residency requirement for tribally-owned HUBZone SBCs. Previously, the Small Business Act did not mandate that tribally-owned concerns maintain a principal office in a qualified HUBZone and hire at least 35 percent of their employees from any HUBZone area, as is the requirement for other HUBZone SBCs. Instead, section 3(p)(5)(A)(i)(I)(bb) of the Small Business Act, 15 U.S.C. 632(p)(5)(A)(i)(I)(bb), required that at least 35 percent of the tribally-owned HUBZone SBC's employees performing a HUBZone contract must reside within an Indian Reservation governed by one or more of the tribal government owners or an adjoining HUBZone. Although that requirement was originally intended to encourage economic development of tribes, Congress determined that, over time, it had the unintended consequence of limiting the kinds of contracts that tribally-owned concerns could perform and of inhibiting their potential synergies with other business organizations.

To remedy the disparity this separate employee residency requirement created for tribally-owned HUBZone SBCs (as compared to other HUBZone SBCs), Section 151 of the Reauthorization Act added as an option for tribally-owned concerns the same residency and principal office requirement that applies to other HUBZone SBCs. As amended, Section 3(p)(5)(A)(i)(I)(aa) of the Small Business Act, 15 U.S.C. 632(p)(5)(A)(i)(I)(aa), now allows tribally-owned concerns the option of either maintaining their principal office in a HUBZone and hiring at least 35 percent of their employees from any HUBZone area, or complying with the existing separate requirement that 35 percent of their employees performing a HUBZone contract reside within an Indian Reservation governed by one or more of the tribal government owners or adjoining HUBZone.

### 2. Section 152 of the Reauthorization Act

In Section 152 of the Reauthorization Act, Congress provided three basic amendments to expand the areas that qualify as HUBZones. First, Section 152 added new Sections 3(p)(1)(E) and 3(p)(4)(D) to the Small Business Act, 15 U.S.C. 632(p)(1)(E), 632(p)(4)(D), to authorize military base closure areas that have undergone final closure to be treated as qualified HUBZones for a period of five years. Congress recognized that many base closure areas are not located in qualified HUBZones, and therefore do not benefit from the job creation and economic revitalization potential of the HUBZone program.

Second, Section 152 revised the statutory definition of "qualified non-metropolitan county" in Section 3(p)(4)(B)(ii)(II) of the Small Business Act, 15 U.S.C. 632(p)(4)(B)(ii)(II). Under the previous definition, some of the poorest rural communities in states with high unemployment did not qualify as a HUBZone based on unemployment because the unemployment qualification was based solely on the statewide unemployment average. Accordingly, Section 152 revised the definition of "qualified non-metropolitan county" to allow for a comparison of a county's unemployment rate to the lower of the statewide or the national average, in determining eligibility.

Third, Section 152 of the Reauthorization Act expanded qualified HUBZones by extending the redesignation period for HUBZone areas through the public release of the 2010 census data. The previous statutory definition of "redesignated area" in Section 3(p)(4)(C) of the Small Business Act, 15 U.S.C. 632(p)(4)(C), allowed those areas that no longer qualify as HUBZones to remain in the program for a period of three years. Congress determined that this three-year grandfather period did not provide sufficient time for firms to recoup a return on their investment in locating their businesses in qualified HUBZone areas, adjusting their ownership structure, and recruiting HUBZone residents as employees. To allow firms additional time to reap the benefits of their HUBZone investment, Section 152 extended the redesignation period until the later of the date on which the Census Bureau publicly releases the first results from the 2010 decennial census or 3 years after the date on which the area ceased to qualify as a HUBZone.

### 3. Section 153 of the Reauthorization Act

Finally, in Section 153 of the Reauthorization Act, Congress provided a five percent HUBZone evaluation price preference in international food aid procurements by the Secretary of Agriculture. Congress explained that the previously authorized price evaluation preference regime may have made it more difficult for non-HUBZone SBCs to compete in food aid tender auctions and, in turn, may have had the unintended effect of diminishing the competitive supplier base. Section 153 therefore amended Section 31(b)(3) of the Small Business Act, 15 U.S.C. 657a(b)(3), to apply a five percent price evaluation preference on the first 20 percent of U.S. Department of Agriculture's procurements of commodities used for international food aid export operations.

This interim rule amends Parts 121, 124, 125 and 126 of SBA's regulations to adopt the specific statutory changes provided under Subtitle E of the Reauthorization Act. In accordance with the express statutory language and declared legislative purposes of those changes, this interim rule amends the exceptions to SBA's affiliation rules in 13 CFR 121.103 and the definition of business concern in § 121.105; for consistency purposes, amends §§ 124.503 and 126.607 to incorporate the preference for HUBZone, 8(a) and service disabled veterans (SDV) over small business set-asides set forth in SBA's SDV regulations, clarifies the definition of "employee" for the HUBZone program in § 125.6; adds new definitions and amends existing definitions in § 126.103; amends the employee residency requirement for tribally-owned HUBZone SBCs and adds the requirements for small agricultural cooperatives to be considered qualified HUBZone SBCs in § 126.200; amends the corporate stock ownership example to reflect the change in ownership requirements in § 126.201; amends § 126.204 to include agricultural cooperatives; clarifies the application of requirements for SBCs applying for HUBZone status based on a location in a qualified base closure area in § 126.304; amends the price evaluation preference for agricultural commodities in § 126.613 and reorganizes and clarifies § 126.700 to make it consistent with SBA's other regulations regarding contractor performance requirements.

### B. Section-by-Section Analysis

Statutory changes to the definition of small agricultural cooperative require

SBA to add another exception to its affiliation rule in § 121.103 and to modify its definition of business concern in § 121.105.

To make the HUBZone regulations consistent with SBA's recently published SDV regulations, SBA is adding paragraph (j) to § 124.503 and revising § 126.607 to incorporate contracting preferences for HUBZone, 8(a) and SDV over small business set-asides. This change will ensure consistent guidance throughout 13 CFR Chapter 1.

To clarify the definition of "employee" as it relates to the HUBZone program, SBA is adding more explicit language to § 125.6(e)(6) to indicate that for purposes of the HUBZone program, the definition of "employee" in § 126.103 controls.

SBA is adding several new definitions in § 126.103 to implement the statutory changes under the Reauthorization Act. To incorporate the new statutory requirement for the treatment of military base closure areas as qualified HUBZones, SBA is adding a definition for the terms "base closure area" and "qualified base closure area" in § 126.103. With respect to the term "base closure area," the interim rule adopts the identical definition of that term provided in the amended Section 3(p)(4)(D) of the Small Business Act, 15 U.S.C. 632(p)(4)(D). Under that definition, a "base closure area" means lands within the external boundaries of a military installation that were closed through a privatization process under specified authority. To accommodate the statutory five-year period in which a base closure area qualifies as a HUBZone, the interim rule adds the new term "qualified base closure area," which limits the qualifying period of a base closure area to five years from the date of final closure of the base or five years from the date of signing of the legislation, December 8, 2004. SBA will rely on the Department of Defense, Office of Economic Adjustment, as the authority to determine whether a base is closed.

In addition, since the amended Section 3(p)(3)(E) of the Small Business Act, 15 U.S.C. 632(p)(3)(E), now authorizes ownership in a HUBZone SBC by small agricultural cooperatives organized or incorporated in the U.S., this interim rule adds a definition for the term "small agricultural cooperative." Amended § 126.103 adopts the existing definition of a "small agricultural cooperative" provided in Section 3(j) of the Small Business Act, 15 U.S.C. 632(j). That definition makes clear that in determining size, an agricultural

cooperative is considered a "business concern" and that the income or employees of any member of the cooperative is not included in the calculation of size. The definition of "small agricultural cooperative" in § 126.103 further indicates that any entity other than an SBC, small cooperative or U.S. citizen may not be a member of a small agricultural cooperative.

SBA is also revising the definition of several existing terms in § 126.103. With respect to base closure areas, SBA is amending the definition of "HUBZone" in § 126.103, to include a "qualified base closure area" as a designated HUBZone. In implementing the statutory changes regarding ownership of HUBZone SBCs by U.S. citizens and by small agricultural cooperatives, SBA is amending the definition of a "HUBZone small business concern." As expressly provided in the amended Section 3(p)(3)(A) of the Small Business Act, 15 U.S.C. 632(p)(3)(A), SBA is amending the definition of a "HUBZone SBC" in § 126.103, to include a SBC that is at least 51 percent owned and controlled by one or more U.S. citizens. Likewise, as expressly provided in the amended Section 3(p)(3)(E) of the Small Business Act, 15 U.S.C. 632(p)(3)(E), the interim rule amends the definition of "HUBZone SBC" to include SBCs that are small agricultural cooperatives organized or incorporated in the United States, wholly owned by one or more small agricultural cooperatives or partially owned by one or more small agricultural cooperatives organized or incorporated in the United States, provided that all other owners are small business concerns or U.S. citizens.

Also in connection with § 126.103, SBA is amending the definition of the term "qualified non-metropolitan county," to incorporate the new statutory definition of the term in Section 3(p)(4)(B)(ii)(II) of the Small Business Act, 15 U.S.C. 632(p)(4)(B)(ii)(II). Consistent with that definition, the interim rule revises the definition of a "qualified non-metropolitan county" to allow a comparison between the statewide unemployment average and the national average in determining whether a non-metropolitan county qualifies as a HUBZone based on unemployment.

SBA is also amending the definition of "redesignated area" in § 126.103, in accordance with the statutory amendments of the term in Section 3(p)(4)(C) of the Small Business Act, 15 U.S.C. 632(p)(4)(C). Under the revised § 126.103, a "redesignated area" is defined as the later of the date on which the Census Bureau publicly releases the

first results from the 2010 decennial census or three years after the date on which the area ceased to qualify as a HUBZone.

With respect to the new eligibility requirements for tribally-owned concerns under Section 3(p)(5)(A)(i)(I) of the Small Business Act, 15 U.S.C. 632(p)(5)(A)(i)(I), SBA is amending § 126.200, which provides the eligibility requirements for such concerns. As amended, § 126.200 now allows tribally-owned concerns located in qualified HUBZones the option of either maintaining their principal office in a HUBZone and hiring at least 35 percent of their employees from any HUBZone area, or of complying with the existing separate requirement that 35 percent of their employees performing a HUBZone contract reside within an Indian Reservation governed by one or more of the tribal government owners or adjoining HUBZone.

SBA is also adding the requirements for small agricultural cooperatives to § 126.200(c) in accordance with Section 3(p)(5)(A)(i)(I) of the Small Business Act, 15 U.S.C. 632(p)(5)(A)(i)(I). To be a qualified HUBZone SBC, a small agricultural cooperative must meet the ownership requirements of 15 U.S.C. 632(p)(3)(E), have a principal office located in a HUBZone and employ at least 35% of its employees from a HUBZone.

The examples in §§ 126.200(b)(1) and 126.201(a) have also been amended to reflect the new requirement that SBCs be at least 51% owned and controlled by U.S. citizens.

Section 126.204, relating to SBA's consideration of affiliates when determining qualified HUBZone SBC's, has also been amended to provide an exception for agricultural cooperatives in accordance with Section 3(j) of the Small Business Act, 15 U.S.C. 632(j). The statutory definition of agricultural cooperative in the Small Business Act provides that when determining the size of a cooperative, SBA may not include the income or employees of the cooperative members. 15 U.S.C. 632(j). This means the cooperative and its members are not considered affiliated by virtue of their membership in the cooperative.

SBA is amending § 126.304 to describe the process for verifying the specific areas that are considered "qualified base closure areas." The interim rule adds a new § 126.304(d), which explains that concerns applying for HUBZone status based on a location within a qualified base closure area must use SBA's List of Qualified Base Closure Areas to verify that the location is within a qualified base closure area.

The HUBZone map will be modified to reflect these areas. It also describes the information concerns may submit to SBA if they believe the List fails to identify a particular location as a qualified base closure area.

SBA is making a technical correction to § 126.503 by changing the word "may," found in subparagraph (c), to "will" in order to be consistent with the language of § 126.803(d). Section 126.503(c) cross references § 126.803, therefore the language in both sections needs to be consistent.

SBA is amending § 126.613 to incorporate the new statutory price evaluation preference for international food aid procurements provided under Section 31(b)(3) of the Small Business Act, 15 U.S.C. 657a(b)(3). The amended § 126.613 provides a 5% price evaluation preference on the first 20% of the USDA procurements for commodities used for international food aid export operations.

Finally, SBA is making a technical correction to § 126.700 by changing the citation from § 125.6(b) to § 125.6(c) and further clarifying the section by reorganizing the paragraphs and adding more explicit language in order to be consistent with § 125.6(c) and the Small Business Act. As currently drafted, § 126.700 is a source of confusion for many SBCs and this confusion may lead to misapplication of SBA's regulations resulting in the award of subcontracts to non-qualified HUBZone concerns. It is also inconsistent with § 125.6 and § 3(p)(5)(C) of the Small Business Act as it incorrectly requires that for construction contracts a qualified HUBZone SBC must perform 50% of the cost of the contract and at least 15% (or 25% depending on type of contract) of the cost of contract for personnel. As currently drafted, the two percentages do not measure the same base, that is, one relates to the overall cost of the contract and one to the cost of the contract incurred for personnel. This discrepancy was never intended and is not consistent with the requirements of the Small Business Act. To clarify this inconsistency, this rule changes the current performance of work requirement for construction contracts from "at least 50% of the contract" to "at least 50% of the cost of contract incurred for personnel." This standard is what is referenced throughout the Small Business Act (*see* §§ 3(p)(5)(C), 8(a)(14)(A) and 15(o)) and in § 125.6 of SBA's regulations, and the change to one standard ensures consistency throughout SBA's regulations. More explicit language was also added to clarify the relationship between the prime and subcontracting performance

of work requirements by stating that not more than 50% of the cost of contract incurred for personnel may be subcontracted to a non-qualified HUBZone SBC.

Although SBA is issuing this rule as an interim rule with an immediate effective date, it encourages public comments on these regulatory amendments. In developing the final rule, SBA will consider all timely comments received.

### C. Justification for Publication as an Interim Rule

In general, SBA publishes a proposed rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act and SBA regulations. 5 U.S.C. 553, and 13 CFR 101.108. The Administrative Procedure Act provides an exception to this standard rulemaking process when an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim rule without soliciting prior public comment.

SBA has determined that there is good cause to issue this rule without prior notice and opportunity for public comment because it is impracticable, unnecessary, and contrary to the public interest to do so under the present circumstances. As discussed above, Congress amended several HUBZone provisions in the Small Business Act to expand the program's reach over the Nation's economically distressed communities and to eliminate unduly restrictive HUBZone requirements that impede the achievement of the HUBZone goals. These statutory changes became effective on December 8, 2004.

As a result of these recent legislative amendments, important provisions of SBA's existing HUBZone, Government Contracting, 8(a) Business Development and Size Standard regulations are now inconsistent with governing sections of the Small Business Act. It is both unnecessary and impracticable to provide advance notice and public participation in implementing the recent statutory changes because SBA is simply adopting the identical amendments mandated by the Reauthorization Act and ensuring consistency with existing provisions of the Small Business Act, and any delay in revising the inconsistent provisions in SBA's existing regulations will hamper the proper application of

important HUBZone requirements. In addition, immediate implementation of the statute is in the public interest, since the legislative amendments expand the opportunities for HUBZone contracting. Specifically, the time it will take to afford prior public participation in this rulemaking will deprive newly eligible firms and economically depressed communities of the needed economic benefits of the HUBZone program, and will frustrate the ability of Federal contracting agencies to utilize the expanded program to achieve the statutory HUBZone procurement goal.

Accordingly, SBA has determined that there is good cause to issue this rule without prior public participation. SBA does, however, encourage the public to comment on the interim rule, especially the clarifications to § 126.700 and will consider all timely comments in preparing the final rule.

### D. Justification for Immediate Effective Date of Interim Rule

The Administrative Procedure Act requires that "publication or service of a substantive rule shall be made not less than 30 days before its effective date, except \* \* \* as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d)(3). SBA has determined that there is good cause for an immediate effective date of this interim rule, instead of observing the 30-day period between publication and effective date. As discussed more fully above in the Justification of Publication of Interim Rule, any delay in the effective date of this interim rule will unduly perpetuate existing inconsistencies between certain provisions of SBA's HUBZone regulations and sections of the Small Business Act. It will also hinder the accomplishment of the HUBZone goals.

### E. Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-602)

OMB determined that this rule constitutes a "significant regulatory action" under Executive Order 12866. SBA's Regulatory Impact Analysis is set forth below.

#### Regulatory Impact Analysis

##### 1. General Considerations

###### a. *Is there a need for the regulatory action?*

SBA has determined that this regulatory action is necessary. SBA is statutorily authorized to administer the HUBZone program and is required to implement all statutory changes to the

program. The Reauthorization Act amended several provisions of the Small Business Act governing the HUBZone program. To implement these statutory changes, SBA must amend its existing HUBZone regulations. The amendments are also necessary and appropriate to better serve the needs of small business concerns (SBCs) and the statutory goals of the HUBZone program. There are no practical alternatives to this implementation of the statutory changes.

b. *What is the baseline?*

SBA considered several baselines in formulating this interim rule. These include the existing HUBZone program regulations and definitions that the interim rule revises; the estimated universe of potential HUBZone SBCs; the existing statutory requirements; the achievement of the three percent HUBZone contracting goal; and the current procurement practices of Federal agencies.

It is difficult to obtain precise quantitative estimates of the impact these changes might have on these baseline criteria. However, SBA estimates that adoption of this interim rule will increase the number of HUBZone SBCs, increase the number of HUBZone procurement actions by Federal agencies, and result in better and more efficient administration of the program. Ultimately, the program would move closer to meeting its statutory objectives of creating jobs and infusing capital into distressed communities.

c. *Were there any alternatives?*

There are no alternatives to implementing the statutorily mandated provisions detailed in the interim rule. The amendments of the Reauthorization Act, require SBA to amend the HUBZone regulations so that they will conform to the new statutory provisions. The regulatory amendments also facilitate the growth of the program to Congressionally-established levels, better serve the program's small business participants, and assist in accommodating the procurement needs of Federal agencies.

## 2. Benefit Estimates

The most significant benefits to implementing the changes included in this interim rule are:

a. *Increased benefits to both small businesses and Federal agencies.*

SBA believes that the changes in this interim rule will increase the base number of small businesses in the HUBZone program and increase the program's viability and utilization by Federal agencies. These two effects are mutually dependent in that the more firms that are in the program, the more

Federal agencies will use the program. Furthermore, when more Federal agencies use the program, more concerns will want to take advantage of the contract assistance available under the program. According to available data, there are an estimated 220 counties to be added as a result of this new legislation. In addition, over 150 locations may be designated as HUBZone locations as a result of military base closures. As these areas are defined by the Department of Defense, they will be posted on the HUBZone Web site and map.

b. *Greater administrative efficiency and program integrity.*

Because the amendments in this interim rule relax some of the previous program requirements, the interim rule will likely streamline and improve the effective administration of the HUBZone program. It will also enhance SBA's ability to administer the program with existing resources and better focus the program benefits on the businesses that operate in areas of low income or high unemployment.

c. *Greater contracting efficiency for Federal agencies.*

SBA believes that by increasing the level of activity and participation in the HUBZone program, it will increase economic savings to the Federal government on HUBZone awards. In particular, an increase in the number of eligible HUBZone concerns will provide procuring agencies with a larger base of HUBZone vendors. This will ultimately reduce the cost of HUBZone contracts through increased competition among HUBZone SBCs.

## 3. Cost Estimates

SBA expects that as a result of this interim rule, there will be significant increases in the number of concerns participating in the HUBZone program and in the number of HUBZone contract dollars. To the extent that this materializes, there may be attendant cost increases to the government in terms of the costs of goods and services and slightly increased administrative costs. However, existing provisions of the Federal Acquisition Regulation concerning the determination of "fair and reasonable" pricing will mitigate any significant monetary costs to the government as a result of this interim rule. SBA does not believe these changes will result in significantly higher costs to HUBZone SBCs because the amendments do not create additional burdens or restrictions on SBCs.

## 4. Other Considerations, Including Distributional Effects, Equity Considerations and Uncertainty

SBA anticipates that the distribution of contracts among different procurement vehicles will change. Non-HUBZone concerns currently participating in the Federal marketplace will be affected economically as a result of their ineligibility to compete for HUBZone contracts. These costs will vary based on the goods and services provided by newly eligible HUBZone SBCs. In some industries there may be very little impact, while in other industries there may be a substantial impact.

Large Federal prime contractors may experience some decrease in contract opportunities as Federal agencies increase their utilization of the HUBZone program. However, these changes are insignificant in light of the magnitude of Federal procurement versus HUBZone procurement. The Federal government spent \$277 billion on goods and services in fiscal year 2003. Of this amount, \$3.4 billion, or 1.23% of total procurements, was awarded to HUBZone firms. This level is significantly lower than the \$8.3 billion that would have been awarded to HUBZone firms if the 3% goal set by Congress for the program had been achieved.

## 5. Conclusion

Most of the benefits of this interim rule will accrue to HUBZone communities. Expanded eligibility for SBCs and designated areas and increased HUBZone contracting should result in more Federal contract dollars going to distressed communities.

Overall, SBA believes that increasing the efficiency and access to the HUBZone program to both Federal agencies and small businesses will result in increased use of the program and a higher probability that the HUBZone program will meet its objectives to create jobs and increase capital investment in HUBZone communities.

SBA has determined that this interim rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35.

This interim rule meets applicable standards set forth in §§ 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. This action does not have retroactive or preemptive effect.

This interim rule will not have substantial direct effects on the States,

on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, SBA determines that this rule has no federalism implications warranting preparation of a federalism assessment.

Because this rule has been issued as an interim final, there is no requirement for SBA to prepare a Regulatory Flexibility Act analysis.

**List of Subjects in 13 CFR Parts 121, 124, 125 and 126**

Administrative practice and procedure, Government procurement, Small businesses.

■ For the reasons set forth above, SBA amends 13 CFR parts 121, 124, 125, and 126, as follows:

**PART 121—SMALL BUSINESS SIZE REGULATIONS**

■ 1. The authority citation for part 121 is revised to read as follows:

**Authority:** 15 U.S.C. 632(a), 632(j), 632(p), 634(b)(6), 636(b), 637(a), 644(c) and 662(5); Sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188; Pub. L. 105–135 sec. 601 *et seq.*, 111 Stat. 2592; Pub. L. 106–24, 113 Stat. 39.

■ 2. Amend § 121.103 to add a new paragraph (b)(7) to read as follows:

**§ 121.103 How does SBA determine affiliation?**

\* \* \* \* \*

(b) \* \* \*

(7) The member shareholders of a small agricultural cooperative, as defined in the Agricultural Marketing Act (12 U.S.C. 1141j), are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

\* \* \* \* \*

■ 3. Revise § 121.105(a) to read as follows:

**§ 121.105 How does SBA define “business concern or concern”**

(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

(a)(2) A small agricultural cooperative is an association (corporate or otherwise) acting pursuant to the provisions of the Agricultural Marketing Act (12 U.S.C.A. 1141j) whose size does not exceed the size standard established

by SBA for other similar agricultural small business concerns. A small agricultural cooperative’s member shareholders are not considered to be affiliates of the cooperative by virtue of their membership in the cooperative. However, a business concern or cooperative that does not qualify as small under this part may not be a member of a small agricultural cooperative.

\* \* \* \* \*

**PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS**

■ 3a. The authority citation for part 124 continues to read as follows:

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

■ 4. Amend § 124.503 to add a new paragraph (j) as follows:

**§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?**

\* \* \* \* \*

(j) The contracting officer should consider setting aside the requirement for HUBZone, 8(a) or SDVO SBC participation before considering to set aside the requirement as a small business set-aside.

**PART 125—GOVERNMENT CONTRACTING PROGRAMS**

■ 4a. The authority citation for part 125 continues to read as follows:

**Authority:** 15 U.S.C. 634(b)(6), 637, 744, and 657f; 31 U.S.C. 9701, 9702.

■ 5. Revise § 125.6(e)(6) to read as follows:

**§ 125.6 Prime contractor performance requirements (limitations on subcontracting).**

\* \* \* \* \*

(e) \* \* \*

(6) *Personnel.* Individuals who are “employees” under § 121.106 of this chapter except for purposes of the HUBZone program, where the definition of “employee” is found in § 126.103 of this chapter.

\* \* \* \* \*

**PART 126—HUBZONE PROGRAM**

■ 6. The authority citation of part 126 is revised to read as follows:

**Authority:** 15 U.S.C. 632(a), 632(j), 632(p) and 657a.

■ 7. Amend § 126.103 as follows:

■ A. Add the terms and definitions for “Base closure area,” “Qualified base closure area,” and “Small agricultural cooperative;” and

■ B. Revise the definitions of “HUBZone,” paragraph (ii) of the definition of “Qualified non-metropolitan county,” “Redesignated area” and paragraphs (1), (5), (6), and (7) of the definition for “HUBZone small business concern (HUBZone SBC).”

The added and revised terms read as follows:

**§ 126.103 What definitions are important in the HUBZone Program?**

\* \* \* \* \*

*Base closure area* means lands within the external boundaries of a military installation that were closed through a privatization process under the authority of:

(1) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of division B of Public Law 101–510; 10 U.S.C. 2687 note);

(2) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100–526; 10 U.S.C. 2687 note);

(3) 10 U.S.C. 2687; or

(4) Any other provision of law authorizing or directing the Secretary of Defense or the Secretary of a military department to dispose of real property at the military installation for purposes relating to base closures of redevelopment, while retaining the authority to enter into a leaseback of all or a portion of the property for military use.

\* \* \* \* \*

*HUBZone* means a historically underutilized business zone, which is an area located within one or more:

(1) Qualified census tracts;

(2) Qualified non-metropolitan counties;

(3) Lands within the external boundaries of an Indian reservation;

(4) Qualified base closure area; or

(5) Redesignated area.

*HUBZone small business concern (HUBZone SBC)* means an SBC that is:

(1) At least 51% owned and controlled by 1 or more persons, each of whom is a United States citizen;

\* \* \* \* \*

(5) An SBC that is owned in part by one or more Indian Tribal Governments or in part by a corporation that is wholly owned by one or more Indian Tribal Governments, if all other owners are either United States citizens or SBCs;

(6) An SBC that is wholly owned by a CDC or owned in part by one or more CDCs, if all other owners are either United States citizens or SBCs; or

(7) An SBC that is a small agricultural cooperative organized or incorporated

in the United States, wholly owned by one or more small agricultural cooperatives organized or incorporated in the United States or owned in part by one or more small agricultural cooperatives organized or incorporated in the United States, provided that all other owners are small business concerns or United States citizens.

\* \* \* \* \*

*Qualified base closure area* means a base closure area for a period of 5 years either from December 8, 2004, or from the date of final base closure, whichever is later.

\* \* \* \* \*

*Qualified non-metropolitan county*

\* \* \* \* \*

(ii) The unemployment rate is not less than 140 percent of the average unemployment rate for the United States or for the State in which such county is located, whichever is less, based on the most recent data available from the Secretary of Labor.

\* \* \* \* \*

*Redesignated area* means any census tract or any non-metropolitan county that ceases to be a qualified HUBZone, except that such census tracts or non-metropolitan counties may be "redesignated areas" only until the later of:

(1) The date on which the Census Bureau publicly releases the first results from the 2010 decennial census; or

(2) Three years after the date on which the census tract or non-metropolitan county ceased to be so qualified. The date on which the census tract or non-metropolitan county ceases to be qualified is the date that the official government data, which affects the eligibility of the HUBZone, is released to the public.

\* \* \* \* \*

*Small agricultural cooperative* means an association (corporate or otherwise), comprised exclusively of other small agricultural cooperatives, small business concerns, or U.S. citizens, pursuant to the provisions of the Agricultural Marketing Act, 12 U.S.C. 1141j, whose size does not exceed the applicable size standard pursuant to part 121 of this chapter. In determining such size, an agricultural cooperative is treated as a "business concern" and its member shareholders are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

\* \* \* \* \*

■ 8. Amend § 126.200 to revise paragraphs (a)(3) and (b)(1)(i), and to add paragraphs (c) and (d) to read as follows:

**§ 126.200 What requirements must a concern meet to receive SBA certification as a qualified HUBZone SBC?**

(a) \* \* \*

(3) *Other Requirements.* The concern must either:

(i) Maintain a principal office located in a HUBZone and ensure that at least 35% of its employees reside in a HUBZone as provided in paragraph (b)(4) of this section; or

(ii) Certify that when performing a HUBZone contract, at least 35% of its employees engaged in performing that contract will reside within any Indian reservation governed by one or more of the Indian Tribal Government owners, or reside within any HUBZone adjoining such Indian reservation. A HUBZone and Indian reservation are adjoining when the two areas are next to and in contact with each other; and

(iii) The concern will "attempt to maintain" (see § 126.103) that applicable employment percentage stated above during the performance of any HUBZone contract it receives.

(b) \* \* \*

(1) \* \* \*

(i) The concern must be at least 51% unconditionally and directly owned and controlled by persons who are United States citizens;

*Example:* A concern that is a partnership owned 50% by an individual who is a United States citizen and 50% by someone who is not, is not an eligible concern because it is not at least 51% owned by United States citizens.

\* \* \* \* \*

(c) *Concerns owned by small agricultural cooperatives.* (1)

*Ownership.* (i) A small agricultural cooperative organized or incorporated in the United States;

(ii) A small business concern wholly owned by one or more small agricultural cooperatives organized or incorporated in the United States; or

(iii) A small business concern owned in part by one or more small agricultural cooperatives organized or incorporated in the United States, provided that all other owners are small business concerns or United States citizens.

(2) *Size.* The small agricultural cooperative must meet the size standard corresponding to its primary industry classification as defined in part 121 of this chapter. However, in determining such size, an agricultural cooperative is treated as a "business concern" and its member shareholders are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

(3) *Principal office.* The cooperative's principal office must be located in a HUBZone.

(4) *Employees.* At least 35% of the cooperative's employees must reside in a HUBZone. When determining the percentage of employees that reside in a HUBZone, if the percentage results in a fraction, round up to the nearest whole number.

(5) *Contract Performance.* The concern must represent, as provided in the application, that it will "attempt to maintain" (see § 126.103) having 35% of its employees reside in a HUBZone during the performance of any HUBZone contract it receives.

(d) *Subcontracting.* The concern must represent, as provided in the application, that it will ensure that it will comply with certain contract performance requirements in connection with contracts awarded to it as a qualified HUBZone SBC, as set forth in § 126.700.

\* \* \* \* \*

■ 9. Amend § 126.201 by revising the example following paragraph (a) to read as follows:

**§ 126.201 Who does SBA consider to own a HUBZone SBC?**

\* \* \* \* \*

(a) \* \* \*

*Example:* U.S. citizens own all of the stock of a corporation. A corporate officer, a non-U.S. citizen, owns no stock in the corporation but owns options to purchase stock in the corporation. SBA will consider the options exercised and the individual to be an owner. Therefore, if that corporate officer has options to purchase 50% or more of the corporate stock, pursuant to § 126.200, the corporation would not be eligible to be a qualified HUBZone SBC because it is not at least 51% owned and controlled by persons who are U.S. citizens.

\* \* \* \* \*

■ 10. Revise § 126.204 to read as follows:

**§ 126.204 May a qualified HUBZone SBC have affiliates?**

A concern may have affiliates provided that the aggregate size of the concern and all of its affiliates is small as defined in part 121 of this title, except as otherwise provided for small agricultural cooperatives in § 126.103.

■ 11. Amend § 126.304 to redesignate the current paragraph (c) as paragraph (d), and to add a new paragraph (c) to read as follows:

**§ 126.304 What must a concern submit to SBA?**

\* \* \* \* \*

(c) Concerns applying for HUBZone status based on a location within a qualified base closure area must use

SBA's List of Qualified Base Closure Areas (located at <http://www.sba.gov/hubzone>) to verify that the location is within a qualified base closure area. If a concern disagrees with the failure of SBA's List of Qualified Base Closure Areas to include a particular area as a qualified base closure area, then the concern must submit relevant documentation from the Department of Defense, Office of Economic Adjustment, or the military department responsible for closing that installation.

\* \* \* \* \*

■ 12. Revise § 126.306 as follows:

**§ 126.306 How will SBA process this certification?**

(a) The AA/HUB or designee is authorized to approve or decline certifications. \* \* \* The decision of the AA/HUB or designee is the final agency decision.

■ 13. Revise § 126.503(c) as follows:

**§ 126.503 What happens if SBA is unable to verify a qualified HUBZone SBC's eligibility or determines that the concern is no longer eligible for the program?**

\* \* \* \* \*

(c) Decertifying Pursuant to a Protest. SBA will decertify a qualified HUBZone SBC and remove its name from the List without first proposing it for decertification if the AA/HUB upholds a protest pursuant to § 126.803 and the AA/HUB's decision is not overturned pursuant to § 126.805.

■ 14. Revise § 126.607(b) and (c) to read as follows:

**§ 126.607 When must a contracting officer set aside a requirement for qualified HUBZone SBCs?**

\* \* \* \* \*

(b) If the contracting officer determines that § 126.605 does not apply, the contracting officer shall set aside the requirement for HUBZone, 8(a) or SDVO SBC contracting before setting aside the requirement as a small business set-aside.

(c) If the contracting officer decides to set aside the requirement for competition restricted to qualified HUBZone SBCs, the contracting officer must:

- (1) Have a reasonable expectation after reviewing SBA's list of qualified HUBZone SBCs that at least two responsible qualified HUBZone SBCs will submit offers; and
- (2) Determine that award can be made at fair market price.

■ 15. Amend § 126.613 to redesignate the current paragraph (c) as paragraph (d), and to add a new paragraph (c) to read as follows:

**§ 126.613 How does a price evaluation preference affect the bid of a qualified HUBZone SBC in full and open competition?**

\* \* \* \* \*

(c) For purchases by the Secretary of Agriculture of agricultural commodities for export operations through international food aid programs administered by the Farm Service Agency, the price evaluation preference shall be 5% on the first portion of a contract to be awarded that is not greater than 20% of the total volume being procured for each commodity in a single IFB.

\* \* \* \* \*

■ 16. Revise § 126.700 to read as follows:

**§ 126.700 What are the performance of work requirements for HUBZone contracts?**

(a) A prime contractor receiving an award as a qualified HUBZone SBC must meet the performance of work requirements set forth in § 125.6(c) of this chapter.

(b) In addition to the requirements set forth in § 125.6(c), one or more qualified HUBZone SBCs must spend at least 50% of the cost of the contract incurred for personnel on its own employees or employees of other qualified HUBZone SBCs.

(1) A qualified HUBZone SBC prime contractor receiving a HUBZone contract for general construction may meet this requirement itself by expending at least 50% of the cost of the contract incurred for personnel on its employees or it may subcontract at least 35% of the cost of the contract performance incurred for personnel to one or more qualified HUBZone SBCs. A qualified HUBZone SBC prime contractor may not, however, subcontract more than 50% of the cost of the contract incurred for personnel to non-qualified HUBZone SBCs.

(2) A qualified HUBZone SBC prime contractor receiving a HUBZone contract for specialty construction may meet this requirement itself by expending at least 50% of the cost of the contract incurred for personnel on its employees or it may subcontract at least 25% of the cost of the contract performance incurred for personnel to one or more qualified HUBZone SBCs. A qualified HUBZone SBC prime contractor may not, however, subcontract more than 50% of the cost of the contract incurred for personnel to non-qualified HUBZone SBCs.

(c) A contracting officer may waive the 50% requirement set forth in paragraph (b) of this section for a particular procurement after determining that at least two qualified

HUBZone SBCs cannot meet the requirement. Where a waiver is granted, the qualified HUBZone SBC prime contractor must still meet the performance of work requirements set forth in § 125.6(c) of this chapter.

Dated: June 17, 2005.

**Hector V. Barreto,**

*Administrator.*

[FR Doc. 05-17206 Filed 8-29-05; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 71**

[Docket No. FAA-2005-21704; Airspace Docket No. 05-ACE-20]

**Modification of Class E Airspace; Newton, KS**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Direct final rule; confirmation of effective date.

**SUMMARY:** This document confirms the effective date of the direct final rule which revises Class E airspace at Newton, KS.

**EFFECTIVE DATE:** 0901 UTC, October 27, 2005.

**FOR FURTHER INFORMATION CONTACT:** Brenda Mumper, Air Traffic Division, Airspace Branch, ACE-520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329-2524.

**SUPPLEMENTARY INFORMATION:** The FAA published this direct final rule with a request for comments in the **Federal Register** on July 21, 2005 (70 FR 41949). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on October 27, 2005. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.