

reported values on its FR 2910a report in order to qualify for reduced reporting will be shifted to an FR 2900 reporting panel.

*Notice and Regulatory Flexibility Act.* The provisions of 5 U.S.C. 553(b) relating to notice of proposed rulemaking have not been followed in connection with the adoption of these amendments. The amendments involve expected, ministerial adjustments prescribed by statute and by the Board's policy concerning reporting practices. The adjustments in the reserve requirement exemption amount, the low reserve tranche, the nonexempt deposit cutoff level, and the reduced reporting limit serve to reduce regulatory burdens

on depository institutions. Accordingly, the Board finds good cause for determining, and so determines, that notice in accordance with 5 U.S.C. 553(b) is unnecessary. Consequently, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601, do not apply to these amendments.

**List of Subjects in 12 CFR Part 204**

Banks, banking, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 204 as follows:

**PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)**

■ 1. The authority citation for part 204 continues to read as follows:

**Authority:** 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

■ 2. Section 204.9 is revised to read as follows:

**§ 204.9 Reserve requirement ratios.**

The following reserve requirement ratios are prescribed for all depository institutions, banking Edge and agreement corporations, and United States branches and agencies of foreign banks:

Category	Reserve requirement
Net transaction accounts:	
\$0 to \$10.3 million .....	0 percent of amount.
Over \$10.3 million and up to \$44.4 million .....	3 percent of amount.
Over \$44.4 million .....	\$1,023,000 plus 10 percent of amount over \$44.4 million.
Nonpersonal time deposits .....	0 percent.
Eurocurrency liabilities .....	0 percent.

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Monetary Affairs under delegated authority, September 25, 2008.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E8-22944 Filed 10-2-08; 8:45 am]

**BILLING CODE 6210-01-P**

**SMALL BUSINESS ADMINISTRATION**

**13 CFR Part 124**

**RIN 3245-AF79**

**Small Disadvantaged Business Program**

**AGENCY:** U.S. Small Business Administration.

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

**SUMMARY:** This rule changes the requirements relating to which firms may certify their status as small disadvantaged businesses (SDBs) for purposes of federal prime contracts and subcontracts. Currently, only those firms that have applied to and been certified as SDBs by SBA may certify themselves to be SDBs for federal prime and subcontracts. This rule allows firms to self-represent their status for subcontracting purposes without first receiving any SDB certification. It also recognizes that the benefits of being an SDB for federal prime contracts has been greatly diminished over the past

years, and shifts the responsibility of identifying firms as SDBs for federal prime contracts to those limited agencies that have authority and chose to use price evaluation adjustments to SDBs.

**DATES:** *Effective Date:* This rule is effective October 3, 2008.

*Comment Date:* Comments must be received on or before November 3, 2008.

**ADDRESSES:** You may submit comments, identified by RIN: 3245-AF79, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail, for paper, disk, or CD-ROM submissions: Joseph Loddio, Associate Administrator, Office of Business Development, 409 Third Street, SW., Mail Code, Washington, DC 20416.
- Hand Delivery/Courier: Joseph Loddio, Associate Administrator, Office of Business Development, 409 Third Street, SW., Washington, DC 20416.

SBA will post all comments on [www.regulations.gov](http://www.regulations.gov). If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), please submit the information to LeAnn Delaney, Deputy Director, Office of Business Development, 409 Third Street, SW., Washington, DC 20416, or send an e-mail to [LeAnn.Delaney@sba.gov](mailto:LeAnn.Delaney@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as

confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

**FOR FURTHER INFORMATION CONTACT:** LeAnn Delaney, Deputy Director, Office of Business Development, at (202) 205-5852, or [LeAnn.Delaney@sba.gov](mailto:LeAnn.Delaney@sba.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 1207 of the 1987 Defense Authorization Act (Pub. L. 99-661, codified in 10 U.S.C. 2323) for the first time established a 5 percent goal for all Department of Defense (DOD) contracts to be awarded to SDBs. To achieve the 5 percent SDB goal, the statute authorized the award of contracts to SDBs using less than full and open competitive procedures. Specifically, DOD developed through regulation a practice known as the "rule of two" for SDBs. Pursuant to the "rule of two," whenever a contracting officer identified two or more SDBs that it believed could perform a specific procurement at a fair and reasonable price, the contracting officer was required to set the contract aside for bidding exclusively among SDBs. In addition, SDBs would receive a 10% price evaluation adjustment in the evaluation of offers in an unrestricted or full and open competition. The DOD's SDB program was a self-certification program. SBA established eligibility criteria, but firms certified their SDB status for particular procurements. SBA

did, however, process protests and appeals relating to SDB status in connection with individual procurements.

In 1994, Congress extended the authority granted to DOD by 10 U.S.C. 2323 to all agencies of the Federal Government through enactment of the Federal Acquisition Streamlining Act (FASA), Public Law 103-355. However, as a result of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), President Clinton ordered the Department of Justice (DOJ) to work with Federal agencies to conduct a review of all race and gender conscious Federal contracting programs and implement necessary regulatory reforms to comply with the Court's ruling. Regulations to implement FASA were delayed until the completion of this review.

In 1996, DOJ completed its review and, on May 23, 1996, published in the **Federal Register** proposed reforms to these Federal preferential contracting programs. 61 FR 26042-6063. The "rule of two" and the corresponding SDB set-aside authority were put on hold pending further review. This left the price evaluation adjustment for SDBs on unrestricted or full and open competitions as the primary benefit for SDB contractors. The Department of Commerce was tasked with the responsibility to determine those industries in which a price evaluation adjustment could be used in Federal procurements. This included developing the methodology for determining the benchmark limitation and developing the methodology for calculating the size of the price evaluation adjustments for eligible industries.

DOJ also proposed governmental SDB certification for all firms seeking to submit offers as SDBs for Federal prime contracts and subcontracts. DOJ believed that a governmental certification would ensure that those who were receiving SDB benefits were truly SDB qualified in accordance with the standards established by SBA, and would readily meet the *Adarand* strict scrutiny test. The proposal included language that allowed procuring agencies to certify concerns as eligible for the SDB program, or "In the alternative, an agency may enter into an agreement with SBA to have SBA make all determinations, including the initial determination of eligibility." *Id.* at 26044. Because of SBA's long-term experience in determining social and economic disadvantage for the 8(a) program and in connection with SDB protests, agencies were strongly encouraged to enter into an agreement

with SBA. In August 1997 and June 1998, SBA published regulations, including standards and procedures, governing the SDB certification process.

On December 9, 2004, Congress allowed the price evaluation adjustment authority for SDBs to expire for the majority of Federal procuring agencies. Nevertheless, it remains in effect through 2009 for DOD, the National Aeronautics and Space Administration (NASA), and the Coast Guard. However, Section 801 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Public Law, 105-261, amended 10 U.S.C. § 2323(e) to prohibit DOD from using the SDB price evaluation preference if the Secretary determines at the beginning of the fiscal year that DOD achieved the SDB 5% goal in the most recent fiscal year for which data are available. DOD has met the 5% goal each year since. As such, DOD has not used the SDB price evaluation preference in DOD prime contracts since 1999. Data in the Federal Procurement Data System indicates that NASA and the Coast Guard rarely use the price evaluation adjustment.

Thus, at this point, only two agencies (NASA and the Coast Guard) are currently able to use the SDB price evaluation preference, and their use is minimal. Considering this, having SBA certify SDBs Government-wide for prime contracts is no longer the most efficient or effective way to certify firms. This rule removes SBA from the SDB certification process. In terms of prime contracts, the rule will have those procuring agencies that have an SDB prime contracts program certify firms as SDBs where the need to do so arises. In other words, if an agency uses the Price Evaluation Adjustment, then they should develop procedures for certifying SDBs. But in all other cases, agencies can rely on self-certification of SDBs. The rule recognizes that the approximately 9,545 firms currently participating in the 8(a) Business Development (BD) program are deemed certified SDB firms during their tenure in the 8(a) BD program. In addition, the approximately 2,814 SBA-certified SDB firms will remain as SDB certified firms for a period of three years from the date of their certifications where they continue to meet all applicable requirements. Finally, the rule gives procuring agencies that have an SDB prime contracts program the authority to accept SDB certifications made by private certifying entities and state and local governments where the procuring agencies believe that it is appropriate to do so. For all of these reasons, SBA does not believe that there will be a great

burden on these procuring agencies to certify firms as SDBs for their programs.

The rule's effect of having procuring agencies make SDB certifications is consistent with one of the alternatives set forth in the 1996 DOJ SDB proposal. In order to make the transition smoother, SBA will conduct training seminars designed to instruct personnel from other agencies on the procedures for making eligibility determinations. This training component is also consistent with the DOJ proposal.

Moreover, as noted above, any firm seeking to represent itself as a SDB for a subcontract on a federal prime contract must currently also be certified as an SDB by SBA. Requiring certification for subcontracts is not required by law, and may contradict the express language of the Small Business Act. In this regard, § 8(d)(3)(F) of the Small Business Act, 15 U.S.C. 637(d)(3)(F), states: "Contractors acting in good faith may *rely on written representations* by their subcontractors regarding their status as \* \* \* a small business concern owned and controlled by socially and economically disadvantaged individuals \* \* \*" (Emphasis added). This language clearly suggests that Congress intended to allow large business prime contractors to rely on the self representations of subcontractors claiming to be SDBs.

SBA believes that the clear language of the Small Business Act should be adhered to. As such, SBA's regulatory change permits firms to self-represent their status as SDBs for subcontracts.

#### *Specific Regulatory Changes*

Section 124.1001 is amended to eliminate references to SBA performing SDB certifications. It also changes the provisions regarding which firms can certify their status as SDBs for both federal prime contracts and subcontracts on federal prime contracts. The rule eliminates the requirement that a firm must have received an SDB certification from SBA before it can represent itself to be an SDB. In order for a concern to represent that it is an SDB in order to receive a benefit as a prime contractor on a Federal Government procurement, the rule states that a firm must: (1) Be a current Participant in SBA's 8(a) BD program; (2) have been certified by SBA as an SDB within three years of the date it seeks to certify as an SDB; (3) have received certification from the procuring agency that it qualifies as an SDB; or (4) have submitted an application for SDB certification to the procuring agency and must not have received a negative determination regarding that application. For subcontracts, the rule permits a firm to represent that it

qualifies as an SDB if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.

The rule eliminates current §§ 124.1003 through 124.1007 relating to Private Certifiers. When SBA first promulgated regulations implementing the Government-wide SDB program, SBA anticipated having entities called "Private Certifiers" to assist in processing SDB applications. The Private Certifier aspect of the SDB program never materialized. As such, there do not need to be regulations pertaining to them.

The rule moves the content of current § 124.1008, regarding how a firm becomes certified as an SDB, to § 124.1003. It also removes the elaborate procedures for applying to SBA (or a Private Certifier) to become certified as an SDB. While the procedures are eliminated from SBA's regulations, SBA expects that some of the substance would be preserved in any procedures developed by procuring agencies. For example, the provision requiring individuals who are not members of groups presumed to be socially disadvantaged to submit statements identifying personally how their entry into or advancement in the business world has been impaired due to their having one or more distinguishing features would be required by individual procuring agencies that process applications for SDB certification.

Section 124.1004 pertains to misrepresentations of SDB status, and evolves from current § 124.1011. On a prime contract, a firm that represents that it is an SDB will be deemed to have misrepresented its status as an SDB if it (1) is not currently a Participant in the 8(a) BD program; (2) did not receive an SBA SDB certification within three years of its representation; (3) has not received an SDB certification from the procuring agency, or has not applied to the procuring agency for SDB certification; or (4) has received a negative determination. For a subcontract, a misrepresentation will occur where there is not a good faith belief that the firm is owned and controlled by one or more socially and economically disadvantaged individuals. Any certification by a firm that SBA found not to qualify as an SDB in connection with an SDB protest or otherwise will be deemed a misrepresentation of SDB status if the firm has not overcome the reason(s) for the negative determination.

The rule also removes current sections 124.1012 and 124.1013. Because SBA will no longer certify firms

as SDBs, provisions relating to firms reapplying to SBA after receiving a negative determination similarly will no longer be needed. In addition, other than its list of certified 8(a) firms, SBA will no longer maintain a list of certified SDB firms. As such, any references to such a list will be eliminated.

The substance of current §§ 124.1014 and 124.1016 is moved to §§ 124.1005 and 124.1006, respectively. Current § 124.1015 is removed as unnecessary.

Finally, under this rule, SBA continues to handle protests and appeals of SDB status in the same manner as it does currently. The protest procedures are similar to applying to SBA for SDB certification. SBA requires the same information and whatever forms or supporting materials deemed relevant. Current §§ 124.1017 through 124.1024 are redesignated as §§ 124.1007 through 124.1014, respectively. SBA's final decision in an SDB protest or appeal is binding on all interested parties. If for example a procuring agency had found a firm to qualify as an SDB and SBA, through an SDB protest or appeal, ruled that the firm did not qualify as an SDB, SBA's decision would overrule the procuring agency determination. In addition, if in connection with a protest SBA finds that a firm does not qualify as a SDB for a contract that has been awarded, the procuring agency cannot take SDB goaling credit for that contract.

## II. Justification for Publication as Interim Final Status Rule

In general, SBA publishes a 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, however, where 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 final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation. SBA must cease performing SDB certifications as of September 30, 2008. If this rule is not effective before that date, SBA might risk a violation of the Anti-Deficiency Act. SBA does not receive any

Congressional funding for processing applications for SDB certification, but instead seeks re-imbusement from those Federal Agencies that utilize SBA's certification in making SDB awards under the Economy Act, (31 U.S.C. 1535). Some of these top 20 procuring agencies have notified SBA that they will cease reimbursement for the SDB certification services as of September 30, 2008. The SDB Program is a statutory requirement for only two agencies, the Coast Guard and the NASA. Other Agencies have benefited from the SDB price evaluation preference in the past, but that law expired for most agencies in 2004. In order for an Agency to order and reimburse for services under the Economy Act, it must receive a benefit from those services. The benefit most procuring Agencies receive from the SDB certification services is minimal in their view, and some have notified SBA that they will not continue reimbursements in Fiscal Year 2009. Basically, the main residual benefit is for the procuring agencies to track their SDB goaling requirement in 15 U.S.C. 644(g)(1) (the SDB goal is 5 percent of all prime contract and subcontract awards for each fiscal year). The loss of so many paying agencies and the inability of SBA to use its own appropriations to make up for shortfalls, results in a lack of funding for a viable SDB certification program. SBA is unable to use its own funds to make up any shortfall because the SDB Program is not an SBA program; the SDB program is a government wide service that SBA agreed to provide under Economy Act through interagency shared funding in 1996. Therefore, SBA cannot provide these SDB certification services beyond the end of Fiscal Year 2008 using SBA appropriations.

SBA has 2,814 SDB firms other than 8(a) participants as eligible solely for SDB status. Without this Interim Final Rule, which will allow them to self-represent their SDB status in good faith to Agencies, there will be no way, after SBA ceases certification services, for Agencies to continue to meet their annual SDB goaling requirements or for any SDBs that are not certified to be considered for SDB procurements. It is critical that this rule be issued so these affected businesses can prepare for the self-representation process.

Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need. Advance solicitation of comments for this rulemaking would be impracticable and contrary to the public interest, as it would harm those small businesses seeking SDB procurements.

Any such delay would be extremely prejudicial to the affected businesses.

Although this rule is being published as an interim final rule, comments are hereby solicited from interested members of the public. These comments must be received on or before November 3, 2008. SBA may then consider these comments in making any necessary revisions to these regulations.

### III. Justification for Immediate Effective Date of Interim Final Rule

The APA 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 finds that good cause exists to make this final rule effective the same day it is published in the **Federal Register**.

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. For the reasons set forth above in II, Justification of Publication of Interim Final Status Rule, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date.

SBA is aware of many entities that will be assisted by the immediate adoption of this rule.

*Compliance with Executive Orders 12866, 12988, 13175, and 13132, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Paperwork Reduction Act (44 U.S.C., Ch. 35)*

#### *Executive Order 12866*

OMB has determined that this rule is significant regulatory action for purposes of Executive Order 12866. OMB has also determined that this rule is not major under the Congressional Review Act.

Because this rule is a significant regulatory action, a Regulatory Impact Analysis, discussing the need, cost, benefits and alternatives to the rule is required.

#### 1. Is there a need for this regulatory action?

Yes, there is a need for this regulatory action. Under the existing regulation, SBA is required to perform SDB certification services for other Agencies. 13 CFR s. 124.1001(c). In addition, the FAR defines an SDB as a small business that has received certification from SBA as a SDB consistent with 13 CFR 124, Subpart B. This Interim Final Rule is necessary since SBA must cease performing SDB certifications as of the

end of Fiscal Year 2008 due to a lack of funding. By the time this Interim Final Rule has been published, SBA will have initiated a FAR case to make the conforming changes to the FAR. These changes will ensure that eligible SDBs will be able to continue to compete for SDB procurements that Agencies use to meet their SDB statutory goals, as well as use the SDB price evaluation preference for NASA and Coast Guard, by self-representing their SDB status. It may also open up other Agencies using either private SDB certifiers or establishing Agency-specific SDB programs. In addition, it will allow these SDBs to continue to participate in the Department of Transportation's (DOT's) Disadvantaged Business Enterprise Program, 49 CFR 26.5, which has relied upon the SBA and FAR SDBs status. Moreover, the SBA Office of Inspector General early on recognized that the current funding structure for the SDB Program is unreliable and unpredictable and that there was no legal basis that assured the other Agencies would continue funding the SDB Program. SBA OIG Audit Report No. 00-19, SDB Certification Program Obligations and Expenditures. Without continued interagency funding, SBA is unable to continue to support the existing rule process by certifying SDBs for the entire Federal Government.

#### 2. What are the potential benefits and costs of this regulatory action?

Currently, SBA has certified only 2,814 firms other than 8(a) participants as eligible solely for SDB status. From FY 98 through FY 07 SBA has been reimbursed by procuring agencies over \$27.5 million for these SDB certifications. The procuring agencies are obligated to reimburse SBA another \$1.2 million in FY 2008, so total reimbursements from procuring agencies will exceed \$28.7 million since FY 1998.

The SDB procurement goal achievement calculation includes 8(a) certified firms (9,994) and SDB certified firms (2,814). Firms certified as 8(a) are also considered to be SDB for statistical purposes. In FY 2005 Federal agencies reported SDB contracts awarded to SDBs totaling \$21.7 billion. When 8(a) contract award dollars are subtracted, the contracts awarded to SDBs in dollars totaled \$11.2 billion, of which DoD awarded \$7.4 billion or 66%. DoD was successful in awarding this amount without the use of the SDB price evaluation adjustment. Based on conversations with the other Federal agencies, virtually all of the remaining SDB dollars, \$3.8 billion, were awarded under full and open competition

without the use of the SDB price evaluation adjustment. During this same period, the Federal Government exceeded the SDB 5% goal, reaching 6.92%.

The SDB certification process is time consuming and costly for many small businesses. During the past five years, the Federal Government has exceeded the statutory 5% SDB goal without the use of the SDB price evaluation adjustment. Eliminating SDB certification would have little negative impact on the SDB community as long as self-representation is allowed. Presently, there is minimal use of the SDB price evaluation adjustment at the Federal prime contract level. Specifically, Congress allowed the SDB price evaluation adjustment authority to expire on December 9, 2004 for all but two agencies. Authority for the two remaining agencies was reauthorized for another three years to 2009. However, for the most part these agencies are not using the price evaluation preference to meet the 5% SDB goal. Therefore, at the prime contract level, there is little or no benefit for a firm to expend substantial time and expense to obtain SDB certification.

Therefore, continuation of the existing SDB certification process is costly, time consuming and burdensome. As opposed to this, self-representation by firms of their status in good faith is cheaper, quicker and less burdensome. SBA will continue to provide an appeal process for contract protests and SDB status. Allowing firms to self represent at the subcontracting level appears to be consistent with Congressional intent.

#### 3. What are the alternatives to this rule?

SBA has identified three separate alternatives to this rule: (1) Self-representation; (2) private certification, and (3) agency specific SDB certification programs.

We believe self-representation is supported by the relevant statute. In terms of subcontracting, § 8(d)(3)(F) of the Small Business Act, 15 U.S.C. 637(d)(3)(F), states: "Contractors acting in good faith may *rely on written representations* by their subcontractors regarding their status as \* \* \* a small business concern owned and controlled by socially and economically disadvantaged individuals, \* \* \* " (Emphasis added). This language suggests that Congress intended to allow large business prime contractors to rely on self certifications by companies claiming to be SDBs. Small business concerns would make the self-representation as an SDB in good faith and the determination would be subject

to SBA SDB protest and appeal procedures.

Private certifiers were contemplated under the existing SBA SDB regulations, but none were ever approved. 13 CFR 124.1003–1009. However, the Private Certifier structure is available if an Agency wanted to go replicate or approximate those regulations and proceed with that option. Since a Private Certifier must be compensated by the Agency hiring them under contract, this option does require a procurement action and Agency funding and oversight.

Agency-specific SDB certification programs could also be established by interested Agencies. We believe this would require rulemaking and the commitment of Agency resources to creation and maintenance of each Agency's SDB program. SBA will also provide training and educational assistance on how to implement and administer a SDB certification program to any interested Agency.

#### *Executive Order 12988*

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

#### *Executive Order 13132*

For purposes of E.O. 13132, the SBA has determined that the rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA determines that this Interim Final Rule has no federalism implications warranting preparation of a federalism assessment.

#### *Executive Order 13175, Tribal Summary Impact Statement*

For the purposes of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, SBA has determined that this Interim Final Rule will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### *Paperwork Reduction Act, 44 U.S.C. Ch. 35*

SBA has determined that this proposed rule does not impose

additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

#### *Regulatory Flexibility Act, 5 U.S.C. 601–612*

Because the rule is an interim final rule, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act (IRFA) analysis. The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an IRFA which describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA requires analysis of a rule only where notice and comment rulemaking are required. Rules are exempt from Administrative Procedure Act (APA) notice and comment requirements and therefore from the RFA requirements when the agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rules issued) that notice and public procedure thereon is impracticable, unnecessary, or contrary to the public interest. In this case it would be contrary to the public interest to delay the promulgation of the rule.

#### **List of Subjects in 13 CFR Part 124**

Administrative practice and procedure, Government procurement, Hawaiian Natives, Indians—business and finance, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

■ For the reasons stated in the preamble, the Small Business Administration amends title 13 CFR part 124 as follows:

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

##### **Subpart B—Eligibility and Protests Relating to Federal Small Disadvantaged Business Programs**

■ 1. 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 Public Law 99–661, Public Law 100–656, sec. 1207, Public Law 101–37, Public Law 101–574, section 8021, Public Law 108–87, and 42 U.S.C. 9815.

■ 2. Revise § 124.1001 to read as follows:

#### **§ 124.1001 General applicability.**

(a) This subpart defines a Small Disadvantaged Business (SDB). It also establishes procedures by which SBA determines whether a particular concern qualifies as an SDB in response to a protest challenging the concern's status as disadvantaged. Unless specifically stated otherwise, the phrase “socially and economically disadvantaged individuals” in this subpart includes, Indian tribes, ANCs, CDCs, and NHOs.

(b) In order for a concern to represent that it is an SDB in order to receive a benefit as a prime contractor on a Federal Government procurement, it must:

(1) Be a current Participant, as defined in § 124.3 of this part, in SBA's 8(a) BD as described in § 124.1 of this part, program;

(2) Have been certified by SBA as an SDB within three years of the date it seeks to certify as an SDB;

(3) Have received certification from the procuring agency that it qualifies as an SDB; or

(4) Have submitted an application for SDB certification to the procuring agency and must not have received a negative determination regarding that application.

(c) A firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.

■ 3. Revise §§ 124.1003 through 124.1006 to read as follows:

#### **§ 124.1003 How does a firm become certified as an SDB?**

(a) All firms that are current Participants in SBA's 8(a) BD program are automatically deemed to be certified SDBs.

(b) Any firm seeking to be certified as an SDB in order to represent that it qualifies and is eligible to obtain a benefit on a federal prime contract as an SDB may apply to the procuring agency for such certification.

(c) A procuring agency may accept a certification from another entity (e.g., a private certifying entity, or a state or local government) that a firm qualifies as an SDB if the agency deems it appropriate.

#### **§ 124.1004 What is a misrepresentation of SDB status?**

(a) Any person or entity that misrepresents a firm's status as a “small business concern owned and controlled by socially and economically disadvantaged individuals” (“SDB status”) in order to obtain an 8(d) or

SDB contracting opportunity or preference will be subject to the penalties imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as well as any other penalty authorized by law.

(b)(1) A representation of SDB status on a federal prime contract will be deemed a misrepresentation of SDB status if the firm does not meet the requirements of § 124.1001(b).

(2) A representation of SDB status on a subcontract to a federal prime contract will be deemed a misrepresentation of SDB status if the firm does not have a good faith belief that it is owned and controlled by one or more socially and economically disadvantaged individuals. Any certification by a firm that SBA found not to qualify as an SDB in connection with an SDB protest or otherwise will be deemed a misrepresentation of SDB status if the firm has not overcome the reason(s) for the negative determination.

(3) Any representation of SDB status by a firm that SBA has found not to qualify as an SDB in connection with a protest or SBA-initiated SDB determination will be deemed a misrepresentation of SDB status if the firm has not overcome the reason(s) set forth in SBA's written decision.

#### § 124.1005 How long does an SDB certification last?

(a) A firm that is certified to be an SDB will generally be certified for a period of three years from the date of the certification.

(b) A firm's SDB certification will extend beyond three years where SBA finds the firm to be an SDB:

(1) In connection with a protest challenging the firm's SDB status (*see* § 124.1013(h)(2));

(2) In connection with an SBA-initiated SDB determination (*see* § 124.1006); or

(3) As part of an 8(a) BD annual review.

(c) A firm that completes its nine-year program term in the 8(a) BD program will continue to be deemed a certified SDB firm for a period of three years from the date of its last 8(a) annual review.

#### § 124.1006 Can SBA initiate a review of the SDB status of a firm claiming to be an SDB?

SBA may initiate an SDB determination on any firm that has been certified to be an SDB by a procuring agency or that has represented itself to be an SDB on a subcontract to a federal prime contract whenever it receives credible information calling into question the SDB status of the firm. Upon its completion of an SDB

determination, SBA will issue a written decision regarding the SDB status of the questioned firm. If SBA finds that the firm continues to qualify as an SDB, the determination remains in effect for three years from the date of the decision.

■ 3. Remove §§ 124.1007 through 124.1016 and redesignate §§ 124.1017 through 124.1024 as §§ 124.1007 through 124.1014, respectively.

**Sandy K. Baruah,**

*Acting Administrator.*

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## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**15 CFR Parts 732, 734, 738, 740, 742, 744, 746, 748, 750, 762, 770, 772, and 774**

[Docket No. 080211163-81224-01]

RIN 0694-AE18

#### Encryption Simplification

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Interim final rule.

**SUMMARY:** This interim final rule amends the Export Administration Regulations (EAR) to make the treatment of encryption items more consistent with the treatment of other items subject to the EAR, as well as to simplify and clarify regulations pertaining to encryption items. The restrictions pertaining to technical assistance by U.S. persons with respect to encryption items are removed, because the current export and reexport restrictions set forth in the EAR for technology already include technical assistance. This rule also removes License Exception KMI as it has become obsolete because of developments in uses of encryption. In addition, this rule removes notification requirements for items classified as 5A992, 5D992, and 5E992. This rule also increases certain parameters under License Exception ENC, which is intended to reflect advances in technology. This rule adds two new review and reporting requirement exclusion paragraphs under License Exception ENC for wireless "personal area network" items and for "ancillary cryptography" items. This rule also adds Bulgaria, Canada, Iceland, Romania, and Turkey to the list of countries that receive favorable treatment under License Exception ENC. Commodities and software pending mass market review may no longer be

exported under ECCNs 5A992 and 5D992 using No License Required (NLR). However, once the mass market review has been received by BIS, then such commodities and software may be exported using License Exception ENC under ECCNs 5A002 and 5D002. This rule will reduce the paperwork burden on the public by 9% (annual dollar amount savings of approximately \$14,000 to the public and \$5,000 to the U.S. Government), because of the removal of certain notification requirements, addition of countries to the list of those receiving favorable treatment under License Exception ENC, and the increase of reporting and review requirement exclusions. The Departments of Commerce, State and Defense will continue to review export control, license review policies, and license exceptions for encryption items in the EAR.

**DATES:** *Effective Date:* This rule is effective October 3, 2008.

**ADDRESSES:** Written comments on this interim final rule may be sent by e-mail to [publiccomments@bis.doc.gov](mailto:publiccomments@bis.doc.gov). Include "Encryption rule" in the subject line of the message. Comments may also be submitted by mail or hand delivery to Sharron Cook, Office of Exporter Services, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th St. & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230, ATTN: Encryption rule; or by fax to (202) 482-3355.

**FOR FURTHER INFORMATION CONTACT:** For questions of a general nature contact Sharron Cook, Office of Exporter Services, Regulatory Policy Division at (202) 482-2440 or E-Mail: [scook@bis.doc.gov](mailto:scook@bis.doc.gov).

For questions of a technical nature contact: The Information Technology Division, Office of National Security and Technology Transfer Controls at 202-482-0707 or E-Mail: C. Randall Pratt at [cpratt@bis.doc.gov](mailto:cpratt@bis.doc.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

##### Steps Regarding Scope of the EAR

This rule revises paragraph 732.2(b) of the EAR, which sets forth instructions on how to determine if your technology or software is publicly available, by adding mass market encryption software with symmetric key length exceeding 64-bits classified under ECCN 5D992. The addition of this phrase harmonizes with the scope of publicly available encryption software that is considered to be subject to the EAR because of the criteria set forth in § 734.3(b)(3) of the EAR.