

government contracts. At that level, the small refiners' share of total U.S. petroleum refining will not be restored to the 7.6 percent share attained by the 1992 revision to the size standard. In its proposed rule, SBA did not intend to present the attainment of a particular small refiners' share as determinative of an appropriate size standard, but rather as only a reference to prior Agency actions. The data on the industry and the comments received on the proposed size standard taken as a whole serve as the basis for SBA's final decision to adopt 125,000 bpcd as the size standard. Although increasing the size standard to 125,000 bpcd does not create additional small refiners, it provided a significant increase in the size standard to allow current small refiners to realize economies of scale through an expansion of their operations or to merge with other small refiners.

SBA does not agree with the commenter that suggests more than one capacity limit. SBA believes this approach would be overly complex as well as a burdensome measure for Federal agencies to apply. Also, SBA does not agree that employees should either be eliminated from the standard or that only those employees in the refining industry be counted. NAICS classifies petroleum refining as a manufacturing industry, as did the Standard Industrial Classification system. Consistent with section 3(a)(2) of the Small Business Act, SBA has established size standards for all manufacturing concerns in terms of number of employees. Further, to include only those employees involved in refinery operations would conflict with SBA's Small Business Size Regulations, 13 CFR 121.106, "How does SBA calculate number of employees?" The regulation requires that all employees of the concern be used to measure the size of a concern, including those of its domestic and foreign affiliates, no matter how or where they are employed.

SBA does not "phase in" size standards. This is because SBA's size standards do not depend on whether or not a concern is small for another agency's program, or on when it comes into compliance with another agency's regulations. Some Federal agencies, such as EPA, outside of their Federal government procurement activities, use small business size standards mostly for regulatory enforcement. For instance, under EPA's gasoline sulfur regulations at 40 CFR part 80, a refiner is small if it had average crude capacity less than or equal to 155,000 bpcd for 1998. To delay applying a size standard for some companies until they have complied

with EPA's regulations, and not delay applying it to others, is inconsistent with SBA's rules and regulations. On a given Federal procurement, it does not treat all bidders equitably. A further reason why delaying application of the size standard until a refiner complies with environmental regulations is not a factor is that a refiner's bpcd capacity takes into effect, as noted above, "the environmental constraints associated with refinery operations" (see EIA's definition of "Barrels per Calendar Day").

Small business size standards have their greatest incidence of applicability in Federal procurement. This 125,000 bpcd size standard relates only to the Federal government's procurement of refined petroleum products, and refiners' participation in the program is voluntary. Size standards for Federal procurement and for all Federal programs apply to every concern in its industry, regardless of the status of their compliance with rules and regulations that have different purposes.

4. Whether SBA Should Incorporate "Total Operable Atmospheric Crude Oil Distillation Capacity" into Its Small Business Definition

Comments received: Two commenters, an association and a refiner, support the added language to standardize the measure within the Federal government. Two other commenters, one a small refiner and the other not, did not see the need for the added clarification. None of the commenters, however, expressed a strong preference of one over the other.

SBA's position: SBA believes that adding "total Operable Atmospheric Crude Oil Distillation Capacity" does in fact add to the specificity of the definition by distinguishing it from refiners' "Downstream Charge Capacity." SBA's definition of a small refiner should, where practical, use terms consistent with those of EIA to avoid confusion among users of the definition. The phrase "total Operable Atmospheric Crude Oil Distillation Capacity" therefore clarifies and specifies the subject of measurement when determining a refiner's small refiner status, because it does not include "Downstream Charge Capacity."

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

The Office of Management and Budget (OMB) has determined that this rule is a "significant" regulatory action for purposes of Executive Order 12866. Size

standards determine which businesses are eligible for Federal small business programs. This is not a major rule under the Congressional Review Act, 5 U.S.C. 800. For the purpose of the Paperwork Reduction Act, 44 U.S.C. ch. 35, SBA has determined that this rule would not impose new reporting or record keeping requirements, other than those required of SBA. For purposes of Executive Order 13132, SBA has determined that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment. For purposes of Executive Order 12988, SBA has determined that this rule is drafted, to the extent practicable, in accordance with the standards set forth in that order. Our Regulatory Impact Analysis follows.

Regulatory Impact Analysis

1. Is There a Need for This Regulatory Action?

SBA is chartered to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To effectively assist intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to the SBA Administrator the responsibility for establishing small business definitions. The Act also requires that small business definitions vary to reflect industry differences. The supplementary information to the proposed rule explained the approach SBA follows when analyzing a size standard for a particular industry. Based on that analysis and on the comments SBA received to the proposed rule, SBA believes an increase is supportable, but to a 125,000 bpcd instead of the proposed 155,000 bpcd.

2. What Are the Potential Benefits and Costs of This Regulatory Action?

The rule affects Federal government agencies purchasing refined petroleum products and small refiners that compete to sell refined petroleum products to the Federal government. Increasing the 75,000 bpcd size standard to 125,000 bpcd will enable small refiners to expand their refining operations or to merge with other small refiners. They can compete for larger Federal petroleum procurements set aside for small businesses or for the 8(a) and HUBZone Empowerment Contracting Programs, as well as those awarded through full and open competition after application of the HUBZone or small disadvantaged