the upcoming crop year indicates that the grower price for the 2009 date crop could range between $65.50 and $114.50 per ton. Therefore, the estimated assessment revenue for the 2009 crop year as a percentage of total grower revenue could range between 0.7 percent and 1.1 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived from the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the California date industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 9, 2009, meeting was a public meeting and all entities, both large and small, were encouraged to express views on this issue.

This rule imposes no additional reporting or recordkeeping requirements on either small or large California date handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on August 28, 2009 (74 FR 44304). Copies of the proposed rule were also provided to all date handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 30-day comment period ending September 28, 2009, was provided for interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because the crop year began on October 1, 2009; handlers are already receiving 2009–10 dates from growers; and the assessment rate applies to all dates received during the 2009–10 and subsequent seasons. Further, handlers are aware of this rule, which was recommended at a public meeting. Finally, a 30-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 987 is amended as follows:

PART 987—DOMESTIC DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

■ 1. The authority citation for 7 CFR part 987 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 987.339 is revised to read as follows:

§ 987.339 Assessment rate.

On and after October 1, 2009, an assessment rate of $0.75 per hundredweight is established for California dates.

Dated: October 27, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. E9–26369 Filed 11–2–09; 8:45 am]

BILLING CODE 3410–02–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 126

RIN 3245–AF44

HUBZone and Government Contracting

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: This rule amends the U.S. Small Business Administration's (SBA's or Agency's) Historically Underutilized Business Zone (HUBZone) program's definition of the term ''employee.''

DATES: This rule is effective May 3, 2010.

FOR FURTHER INFORMATION CONTACT: Mariana Pardo, HUBZone Program Office, at (202) 205–2985 or by e-mail at: *mariana.pardo@sba.gov.*

SUPPLEMENTARY INFORMATION:

On January 26, 2007, the SBA published in the **Federal Register**, 72 FR 3750, a proposed rule to amend the HUBZone program's definition of the term ''employee.'' In this proposed rule, SBA sought to revise the definition of the term ''employee'' to: (1) Delete the full-time equivalency requirement; (2) specifically allow HUBZone small business concerns (SBCs) to count leased or temporary employees or employees obtained through a temporary agency, professional employee organization (PEO) arrangement or union agreement, as employees; (3) specifically state that SBA relies on the totality of circumstances as further defined by Size Policy Statement No. 1 when determining whether individuals are employees of a concern; (4) explain that volunteers are not employees; (5) define volunteers as those persons that receive no compensation; and (6) address the status of individuals that own all or part of the SBC but receive no compensation for work performed.

The SBA received a total of eight comments on the proposed rule. Five comments supported the rule in general and three opposed the rule. These comments are discussed in detail below.

Summary of Comments and Response to Comments

The SBA received one comment stating that the definition of the term ''employee'' should specifically address the issue of deferred compensation. The commenter wanted the SBA to clarify that a person that has agreed to defer his or her compensation will not be considered an employee.

The SBA agrees with this comment and believes that if it permitted a non-owner individual to work for no compensation, or even deferred compensation, and be considered an employee for HUBZone program purposes, it would open up the program to potential abuse. Finding a person to be an employee where the individual has deferred compensation is contrary to the intent of the HUBZone program, which is to increase gainful employment in historically

underutilized business zones. Further, we note that the issue regarding deferred compensation was actually the subject of a recent Court of Federal Claims decision. In that case, the court ruled that SBA's interpretation of its regulation—that persons who have agreed to defer his or her compensation will not be considered an employee for HUBZone program purposes—is reasonable. *Aeolus Systems, LLC* v. *United States,* No. 07–581 C, slip op. (Fed. Cl. Oct. 31, 2007). Consequently, the SBA agrees with this comment, and has clarified the rule to specifically address deferred compensation.

Another commenter recommended deleting the specific language in the proposed rule that refers to ''professional employee organization'' (PEO) and replacing it with the phrase ''or co-employed pursuant to a professional employer organization arrangement.'' The comment stated that the purpose of this amendment is to distinguish PEOs from leasing and temporary employment companies or agencies. According to the comment, with respect to PEOs, the PEO and the small business client co-employ the employees; in comparison, temporary agencies or leasing companies supply a pool of labor to the clients and the workers return to the temporary agency or leasing company for reassignment upon termination of the arrangement. The SBA agrees with this comment and has made the recommended change.

In addition, the same commenter was concerned about references in the preamble to the proposed rule concerning SBA's Size Policy Statement and ''payment of wages.'' In the preamble to the proposed rule, the SBA explained that because of the numerous types of agreements in the public domain concerning temporary, leased, and co-employees, SBA cannot state definitively that each of those types of employees are employees of the HUBZone SBC. 72 FR 3752. Therefore, the SBA will look to the totality of circumstances, including whether the HUBZone SBC pays the employees' wages. *Id.*

The comment stated that the ''W–2 employer'' should not be the determinative factor in deciding who employs a worker. Specifically, with respect to PEOs, the commenter states that the client small business provides the payroll to the PEO, who in turn pays the employees. The SBA agrees, and the ''W–2 employer'' is not the determinative factor. As the comment noted, with respect to PEOs, the small business client provides the funding for the employees' wages when it provides the payroll to the PEO, who in turn remits payment to the co-employees. As explained in Size Policy Statement No. 1, the SBA will review many factors, including whether the HUBZone SBC pays the employees wages and/or withholds employment taxes and/or provides employment benefits. 72 FR at 3753. Consequently, the SBA does not believe any change to the proposed rule or other clarification is necessary to address this comment.

The SBA received three comments opposing the proposal to count workers obtained through unions as employees of the HUBZone SBC and one comment specifically supporting the rule. One comment from a union stated its belief that the rule will prevent companies from using union workers and that the SBA does not have a sufficient basis for this proposal. Similarly, another commenter stated its belief that the rule will prevent small businesses from using unions because unions can not control the residency of the union members.

The definition of the term ''employee'' includes all persons employed by a HUBZone SBC. With respect to union workers, the workers are performing work for the HUBZone SBC, not the union. The HUBZone SBC pays the wages of these employees and controls the employees' work. In at least one private letter ruling, the IRS has stated that ''when working on the targeted jobs, the workers are employees of the contractors for whom they perform services. They are not employees of the Union.'' I.R.S. Priv. Ltr. Rul. 91–06–047 (Nov. 15, 1990). The same is true here—the workers are employees of the HUBZone SBC for whom they perform services and are not employees of the union. In addition, if a HUBZone SBC were allowed to utilize union workers and not count them as employees, it would be inconsistent with SBA's treatment of other similar types of workers, including temporary workers and those provided via a PEO arrangement. Thus, the definition of the term employee includes those workers provided by a union and who perform services for the qualified HUBZone SBC.

One commenter opposed the rule in general and believes that SBA has no basis to support the finding that any change is needed in the definition of the term ''employee'' to prevent abuse. This same commenter believes that the proposed rule creates uncertainty in who is counted as an employee and that the totality of circumstances test as proposed is different than the current test. This commenter believes that the rule will harm smaller businesses that can not maintain a large staff to meet the requirements of the program. In sum, the commenter believes that more time is needed before making a change to this definition.

The SBA disagrees with this comment. First, the totality of circumstances test has been in the SBA rule since the inception of the program. 63 FR 31896, 31909 (June 11, 1998). Second, at least one court has affirmed the SBA's use of this test and ruled that SBA's incorporation of relevant factors from a previous policy statement into the regulation's ''totality of circumstances'' test is not erroneous or contrary to controlling statute or regulation. *See Metro Machine Corp.* v. *SBA,* 305 F.Supp.2d 614 (E.D. VA 2004). Finally, the agency has been reviewing the definition of the term employee for several years now, beginning with a proposed rule in 2002. The SBA has received a relatively few number of comments evidencing to the Agency that the proposal is acceptable to most HUBZone SBCs (who have now had 3 opportunities to formally comment on the issue). The SBA has conducted thousands of program examinations and re-certifications and has examined this issue thoroughly. The SBA believes that it has a reasonable basis to support a change in the regulation, as set forth in the proposed and this final rule.

One comment stated that the SBA should not allow employees working only 40 hours a month to be considered employees for HUBZone program purposes because such a rule would promote abuse and more non-HUBZone residents would end up getting higher paying full-time work. In contrast, one commenter specifically agreed with the proposed minimum of 40 hours per month. As explained in the proposed rule, the SBA believes that the 40 hours per month requirement precludes a firm from receiving HUBZone status if it merely hires a few HUBZone residents to work one or two hours a week. SBA believes that this minimum work requirement (40 hours a month) provides flexibility to the HUBZone SBCs and the employees who choose to work part-time, but at the same time minimizes possible abuses of the rule. The SBA notes that in order to determine whether an employee works 40 hours a month, the Agency will rely on the most recent payrolls of the small business.

The SBA received two comments concerning the effect this rule will have on current HUBZone program participants and those participants that have already submitted an offer or are getting ready to submit an offer. One of these commenters suggested the SBA provide for a phase in period of one year for those firms that currently use leased

employees. After reviewing these comments, the SBA has provided for an effective date of this rule 6 months from its date of publication in the **Federal Register.** The SBA believes this would be sufficient time for HUBZone small businesses to make any necessary changes to address the new definition of the term employee.

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)

SBA has determined that this rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35. Further, this rule meets applicable standards set forth in section 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.

OMB has determined that this rule constitutes a ''significant regulatory action'' under Executive Order 12866 and in the proposed rule, the SBA prepared a Regulatory Impact Analysis. The SBA received no comments on this analysis and continues to believe that our analysis is accurate.

This 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.

Final Regulatory Flexibility Analysis for the HUBZone Regulations

SBA has determined that this rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* In the proposed rule, the SBA prepared an Initial Regulatory Flexibility Act Analysis (IRFA). The SBA did not receive any comments on this IRFA. The RFA requires the SBA to prepare a Final Regulatory Flexibility Act Analysis (FRFA). The RFA provides that when preparing a FRFA, an agency shall address all of the following: A statement of the need for, and objectives of, the rule; a summary of the significant issues raised by the public in response to the IRFA; a description of the estimate of the number of small entities to which the rule will apply; a description of the projected reporting, recordkeeping and other compliance requirements; and a description of the steps taken to minimize the significant economic impact on small entities. This FRFA considers these points and the potential impact of the regulation on small entities.

(a) Need for, and Objectives of, the Rule

SBA believes that the amendments to the definition of the term ''employee'' will ease HUBZone program eligibility requirements perceived to be burdensome on concerns, and streamline the operation of the HUBZone Program.

(b) Summary of Significant Issues Raised by the Public in Response to the Initial RFA

The SBA did not receive any comments on the IRFA. The SBA addressed all of the comments it received on the rule in the preamble, set forth above.

(c) Estimate of the Number of Small Entities to Which the Rule May Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rule. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.'' SBA's programs do not apply to ''small organizations'' or ''small governmental jurisdictions'' because they are non-profit or governmental entities and do not qualify as ''business concerns'' within the meaning of SBA's regulations. SBA's programs generally apply only to for-profit business concerns. Therefore, the regulation (like the regulation currently in effect) will not impact small organizations or small governmental jurisdictions.

Small businesses that participate in Federal Government contracting are the specific group of small entities affected most by this rule. While there is no precise estimate for the number of SBCs that will be affected by this rule, there are approximately 368,000 SBCs registered in the Central Contractor Registration's (CCR's) Dynamic Small Business Search (DSBS) database (formerly known as PRO–Net). The DSBS contains profiles of SBCs that includes information from SBA's files and CCR. While there is no precise estimate for the number of SBCs that will be affected by this rule, SBA believes that over 30,000 SBCs will apply for certification as qualified HUBZone SBCs over the life of the program. This number is based upon 1992 census data, the number of HUBZone SBCs registered in CCR, and a reasonable extrapolation of this data to account for growth.

In the past few years, SBA has received thousands of applications for the HUBZone Program and has certified over 10,000 SBCs into the program. SBA believes that the incentives available through participation in the program, *i.e.,* HUBZone set-asides and price evaluation preferences, will result in additional SBCs relocating to HUBZones. SBA is unable to predict the number of SBCs that will relocate to HUBZones and be eligible for the program, but estimates that approximately 30,000 SBCs are now eligible or will become eligible.

Of the 30,000 SBCs that have a principal office located in a HUBZone, SBA believes that most will be directly affected by this rule. This is based on the fact that of the over 10,000 HUBZone SBCs listed in CCR, over 7,000 list services and construction as the general nature of their business. Thus, it appears that most qualified HUBZone SBCs are in those industries. According to the information received, SBCs in the construction and services industries use temporary and leased employees.

The final amendment to the definition of the term employee will allow leased and temporary employees to be considered employees of a concern. These leased and temporary employees would be counted toward the 35% HUBZone residency and principal office requirements. At one point, such employees comprised approximately 2–5% of the work force in the U.S. economy. *Labor Shortages, Needs, and Related Issues in Small and Large Businesses,* Nov. 2, 1999 (report prepared for the Office of Advocacy) (available at: *http://www.sba.gov/advo/research/rs195atot.pdf*). In addition, the report stated that small businesses accounted for the employment of about 40% of such employees. *Id.* Although SBA does not know exactly how many SBCs eligible for the HUBZone Program use leased or temporary employees, this data further evidences that many concerns may be affected by this rule.

(d) Projected Reporting, Recordkeeping and Other Compliance Requirements

This final rule imposes no new reporting requirement on small businesses.

(e) Steps Taken to Minimize the Significant Economic Impact on Small Entities

SBA has decided that this rule will not take effect until six months after publication in the **Federal Register.**

This will allow HUBZone SBCs sufficient time to make any necessary changes to remain eligible for the program and for HUBZone contracts. SBA believes this will minimize the impact of this rule, if any, on HUBZone small businesses.

List of Subjects in 13 CFR Part 126

Government procurement, Small businesses.

■ For the reasons set forth above, SBA amends 13 CFR part 126, as follows:

PART 126—HUBZONE PROGRAM

■ 1. The authority citation for 13 CFR part 126 continues to read as follows:

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

■ 2. Amend § 126.103 by revising the definition of the term ''employee'' to read as follows:

§ 126.103 What definitions are important in the HUBZone program?

* * * * *

Employee means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours per month. This includes employees obtained from a temporary employee agency, leasing concern, or through a union agreement or co-employed pursuant to a professional employer organization agreement. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes and those set forth in SBA's Size Policy Statement No. 1, in determining whether individuals are employees of a concern. Volunteers (*i.e.,* individuals who receive deferred compensation or no compensation, including no in-kind compensation, for work performed) are not considered employees. However, if an individual has an ownership interest in and works for the HUBZone SBC a minimum of 40 hours per month, that owner is considered an employee regardless of whether or not the individual receives compensation.

* * * * *

Dated: August 3, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–26229 Filed 11–2–09; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM419; Special Conditions No. 25–396–SC]

Special Conditions: Airbus Model A340 Series Airplanes; Seats With Inflatable Lap Belts

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for Airbus Model A340 airplanes. These airplanes, manufactured by Airbus, will have novel or unusual design features associated with seats with inflatable lap belts. The FAA has issued similar special conditions addressing this issue for the Airbus Model A340 series airplanes. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is November 3, 2009. We must receive your comments by December 18, 2009.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, *Attn:* Rules Docket (ANM–113), Docket No. NM419, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM419. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Alan Sinclair, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2195, facsimile (425) 227–1232.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice of, and opportunity for, prior public comment on these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public-comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel about these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive by the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to let you know we received your comments on these special conditions, send us a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On September 23, 2008, Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac, Cedex, France, applied for a design change to Type Certificate No. A43NM for installation of inflatable lap belts in Airbus Model A340 series airplanes. These special conditions allow installation of inflatable lap belts for head-injury protection on certain seats in Airbus Model A340 series airplanes. The FAA has issued similar special conditions, No. 25–371–SC, on May 7, 2009, for Airbus Model A340 series airplanes. These airplanes, currently approved under Type Certificate No. A43NM, are swept-wing, conventional-tail, twin-engine, turbofan-powered, twin-aisle, large-sized, transport-category airplanes.

The inflatable lap belt is designed to limit occupant forward excursion if an accident occurs. This will reduce the