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Government Contracts Alert

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SBA Proposed Rule Would End 8(a) Presumption of Social Disadvantage, impacting program eligibility

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SBA proposes to eliminate group-based presumptions and require individualized proof of social disadvantage and material harm.

What's the impact?

- SBA proposes ending the 8(a) rebuttable presumption of social disadvantage in 13 CFR 124.103.
- New standard would require individualized proof that a government, university, or company action was biased against (or favored others over) the applicant's group and caused "material harm."
- Entity-owned firms (tribes, Alaska Native corporations, Native Hawaiian organizations, and community development corporations) are not affected; comments are due 30 days after publication; and SBA may later address impacts on current participants.

On June 11, the US Small Business Administration (SBA) published its proposed rule entitled "Reforms to Remove SBA's Rebuttable Presumption of Social Disadvantage for Individually Owned Firms Only; Reforms Do Not Impact Entity-Owned Firms." In the proposed rule, SBA proposes to amend its regulations to remove the rebuttable presumption that individuals in certain designated groups are socially disadvantaged and set forth revised standards for individuals seeking to establish social disadvantage. Comments on the proposed rule are due 30 days after the date of publication. These changes are the culmination of several years of litigation and policy changes surrounding the way in which SBA determines eligibility for the 8(a) Business Development Program.

The 8(a) Program

The 8(a) Business Development Program (the 8(a) Program) was established by the Small Business Act (15 U.S.C. 631 et seq.) in 1953. The 8(a) Program created contracting preferences for small businesses owned and controlled by "socially and economically disadvantaged individuals." (15 U.S.C. 637). Businesses that participate in the 8(a) Program receive training and assistance to help them grow and compete effectively in the market, including management, technical, financial, and procurement assistance. There are two categories of businesses that are eligible to participate in the 8(a) Program: those owned and controlled by individuals who are socially or economically disadvantaged, or small businesses owned by Alaska Native corporations (ANCs), community development corporations (CDCs), Indian tribes, and Native Hawaiian organizations (NHOs). Once a firm is 8(a)-certified, it is eligible to compete for and receive set-aside and sole-source contracts, among other benefits.

The rebuttable presumption of social disadvantage and *Ultima*

The standards for demonstrating eligibility for the 8(a) Program are set forth in the SBA regulations at 13 CFR Part 124. Among other things, applicants must establish "social disadvantage." With respect to an individual, the existing regulation describes socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control." (13 CFR 142.103(a)). With respect to establishing social disadvantage, the existing SBA regulation at 13 CFR 124.103(b)(1) states that there is a "rebuttable presumption" that individuals that are members of certain groups are socially disadvantaged, including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and Subcontinent Asian Americans, and members of other groups that SBA may designate from time to time. *Id.* The presumption may be overcome with "credible evidence to the contrary." (13 CFR 124.103(b)(3)). Individuals who are not members of designated groups must establish social disadvantage by a preponderance of the evidence, through an individualized, more robust analysis (13 CFR 103(c)).

In *Ultima Services Corp. v. U.S. Department of Agriculture*, (683 F. Supp. 3d 745, 774, E.D. Tenn. 2023), the US District Court for the Eastern District of Tennessee held that the long-standing "rebuttable presumption" of social disadvantage for certain minority groups was unconstitutional. Following that decision, the SBA required all applicants and participants to demonstrate social disadvantage via an individualized narrative, effectively requiring the analysis under 13 CFR 124.103(c) across the board.

Social disadvantage in 2026

SBA MEMORANDUM

In January 2026, the SBA issued a memorandum to its Office of Government Contracting and Business Development and Office of Field Operations, emphasizing the SBA's agreement that "the presumption of social disadvantage based on enumerated races in its regulations is unconstitutional" and clarifying the SBA's current practices: (1) the 8(a) Program should be administered "race neutrally," (2) the SBA will not approve admissions to the 8(a) Program based on "social disadvantage narratives," (3) all employees must "treat all Americans fairly and equally in compliance with President Trump's Executive Orders 14151 and 14173," and (4) when considering whether an individual has suffered social disadvantage, the SBA must consider "for example, such factors as whether such individual has been the victim of illegal or radical DEI policies or illegal affirmative action policies or has otherwise been the victim of discriminatory practices such as race-based quotas, set-asides, or hiring targets, in each case, whether by governmental or non-governmental actors."

CHANGES IN THE PROPOSED RULE

The SBA proposed rule formalizes the guidance in the January 2026 memorandum and outlines a sea change in how individual-owned firms can demonstrate social disadvantage to qualify for the 8(a) Program. The proposed rule emphasizes that the revisions to the 8(a) regulations do not, "in any way amend or affect the eligibility of entity-owned small businesses (i.e., those owned by tribes, ANCs, NHOs, or CDCs)." The SBA is crystal clear on this point, emphasizing it in the title of the proposed rule itself.

The Proposed Rule identifies four key revisions to 13 CFR 124.103:

- Aligns 13 CFR 124.103 with the statutory text in 15 U.S.C. 637(a)(5) and the related purpose section (15 U.S.C. 631 (f)(1)(B)).
- Replaces the current regulatory tests for social disadvantage with a new test under which "any individual American citizen can establish social disadvantage by showing that within his or her lifetime, the federal or a state or local government or a university of corporation, through any action, policy, rule, regulation, or other practice of any of its agencies,

subsidiaries, or authorized agents, discriminated or was biased against a clearly definable racial, ethnic, or cultural group of which the citizen is a member, or favored in any way a racial, ethnic, or cultural group of which the citizen is not a member, and that the discrimination, bias, or harm materially harmed the citizen." This category expressly includes "unlawful" diversity, equity, or inclusion (DEI) programs, "unlawful" affirmative action programs or policies, race-based quotas, etc.

- Revises 13 CFR 124.103(c) by removing the current "non-presumptive" test for social disadvantage, leaving only the new 13 CFR 124.103(b) test for social disadvantage.
- Removes the process for group inclusion on the rebuttable presumption list under 13 CFR 124.103(d), as SBA proposes eliminating the rebuttable presumption.

These proposed changes have the potential to reshape the 8(a) Program and its participants. To meet the social disadvantage criteria for the 8(a) Program, applicants would have to show that (1) during the US citizen's lifetime, (2) a governmental or private entity in the United States, (3) through any action, policy, rule, regulation, or other practice of any of its agencies, subsidiaries, or authorized agencies, (4) discriminated or was biased against, (5) a clearly definable racial ethnic or cultural group, (6) of which the citizen is a member. Or the citizen may demonstrate that such an entity favored in any way a racial, ethnic, or cultural group of which the citizen is not a member. The citizen must also demonstrate that the discrimination, bias, or favoritism resulted in "material harm" to the citizen, defined as "loss of access to or diminished opportunities related to economic advancement."

To establish this social disadvantage, the citizen must self-certify that they were a member of the particular group at the time of the entity's action or during the period of the relevant action, policy, rule, or other practice. The citizen must also provide evidence that the entity's action, policy, rule, or other practice favored other groups, excluding the citizen's group, or disadvantaged the citizen's group, or that the entity took adverse actions against or otherwise disadvantaged the citizen's group. As examples, the proposed regulation specifically cites "prior iterations of 13 CFR 124.103" that excluded the citizen's racial or ethnic group as a group entitled to the rebuttable presumption of social disadvantage, and "situations where a citizen's group was disadvantaged in college or university admissions decisions or otherwise discriminated against by a private entity in an unlawful manner." The evidence can include publicly available materials (e.g., materials on government, university, and corporate websites).

IMPACT OF THE PROPOSED RULE

In short, the proposed rule eliminates the historical presumption of disadvantage based on an individual's inclusion in a specified socially disadvantaged group and replaces it with a test by which an individual may demonstrate social disadvantage on the basis of a specific government or private entity action, policy, etc., during their lifetime. In theory, under the proposed

regulation, an applicant could demonstrate social disadvantage by identifying that they were not a member of one of the groups granted a "rebuttable presumption" under the previous iteration of 13 CFR 124.103 and suffered "material harm" as a result. In other words, an applicant could demonstrate they were socially disadvantaged because they were not a member of one of the groups presumed to be socially disadvantaged under the previous version of the regulations and suffered material harm due to their lack of access to the 8(a) Program.

Social disadvantage is only one piece of the 8(a) Program eligibility requirements; an applicant must also demonstrate certain other eligibility criteria, including economic disadvantage, good character, and a potential for success. However, the revision of the social disadvantage requirement has the potential to substantially change the makeup of the 8(a) Program. In the long term, it remains to be seen whether a subsequent possible Democratic administration would retain these revised requirements or make yet another change to the social disadvantage eligibility requirement. In the short term, however, new entities intending to apply to the 8(a) Program should prepare to demonstrate social disadvantage in accordance with the soon-to-be finalized version of the requirement. Although the proposed rule states that SBA "does not currently intend to apply the new test to current [p]articipants at their next annual review," SBA invites comment on any "reliance interests that would be implicated by these proposed changes." This leaves open the possibility that SBA will, in fact, require existing 8(a) firms to demonstrate social disadvantage according to this new test, either in their next annual review or in subsequent reviews.

Nixon Peabody's Government Contracts team is closely tracking the SBA's proposed 8(a) reforms and can help businesses assess eligibility under the new social disadvantage standard, develop supporting narratives and evidence, and prepare strategic comments and certification submissions. We also counsel current 8(a) participants on annual review risk and compliance planning as SBA finalizes implementation.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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