

ALERT

SBA Proposes New “Social Disadvantage” Test for 8(a) Eligibility, Replacing Rebuttable Presumption

June 15, 2026

As we previewed in our previous alert, on June 11, 2026, the U.S. Small Business Administration (SBA) proposed an amendment to 13 C.F.R. § 124.103, revising the 8(a) Business Development Program eligibility process. The proposed rule would remove the defunct “rebuttable presumption” standard and replace it with a new test to determine which small businesses qualify as “socially disadvantaged” under the program. Through this proposed rule, SBA aims to align its regulations with the decision in *Ultima Servs. Corp. v. United States Dep’t of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023), which held that the regulations granting certain racial and ethnic groups a rebuttable presumption of disadvantage violates the Fifth Amendment’s right to equal protection. Rather than merely deleting the rebuttable presumption from the regulation, SBA’s proposed rule fundamentally alters the long-standing framework for identifying socially disadvantaged individuals eligible for the 8(a) program.

SBA seeks to align the regulation with the statutory language in 15 U.S.C. § 637(a)(5), which states that “[s]ocially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” It does so by replacing the rebuttable presumption test, including the “group inclusion” process for identifying new disadvantaged categories, as well as the prior individual examination test for social disadvantage, with a new test. SBA emphasized that this change does not affect entity-owned businesses, such as Alaska Native Corporation (ANC), or tribal-owned businesses.

Authors

George E. Petel
Partner
202.719.3759
gpetel@wiley.law
Anthony Iorio
Associate
202.719.3392
tiorio@wiley.law

Practice Areas

Government Contractors & Grantees
Government Contracts
Small Business Programs and
Nontraditional Defense Contractors
Trump Administration Resource Center

The New Test for Disadvantage

Under the proposed test, any U.S. citizen may establish social disadvantage by showing they were materially harmed, at any point in their lifetime, by a federal, state, or local government, university, or corporation that either (1) engaged in discrimination or bias against a definable racial, cultural, or ethnic group of which the individual is a member, or (2) favored an identity group of which the individual is not a member. The disadvantaged individual may self-certify and submit supporting evidence of membership in the relevant identity group and their material harm.

The proposed rule offers several illustrative examples of qualifying discrimination, including:

- Membership in a racial or ethnic group that prior versions of 13 C.F.R. § 124.103 excluded from the rebuttable presumption;
- Exposure to "unlawful" DEI programs or policies;
- Disadvantage in college or university admissions decisions based on the applicant's racial or ethnic group; or
- Participation in a government or private program that favored other groups based on race or ethnicity.

Takeaways

The proposed rule substantially broadens the class of individuals who may claim social and economic disadvantage and the scope of qualifying circumstances for the 8(a) program. As a result, existing 8(a) businesses should expect an increased volume of 8(a) applications, leading to more competition for 8(a) contracts, and interested applicants should expect longer approval timelines. SBA notes that the rule "has no effect on the amount or dollar value of any federal contract requirements or of any financial assistance provided through SBA," and is unlikely to have "a significant adverse effect on competition."

Current 8(a) participants and future applicants should carefully review the proposed rule and consider submitting comments before the period closes on July 13, 2026. Additionally, interested parties should evaluate their social disadvantage status and determine the steps necessary to maintain or establish eligibility. Notably, SBA states that if the proposed rule is adopted, the agency "does not currently intend to apply the new test to current Participants at their next annual review." Even so, current participants should plan for the possibility that future certifications or program renewals will be governed by the new test.

Tessa Jones, a Summer Associate at Wiley Rein LLP, contributed to this alert.