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INSIGHT

# Proposed SBA Rule Would Establish New Test for Social Disadvantage Under 8(a) Program

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The U.S. Small Business Administration (SBA) released a proposed rule on June 11, 2026, that would revise the criteria for individuals to establish social disadvantage for purposes of participation in the SBA's 8(a) Business Development Program. The notice discusses a 2023 federal district court ruling that forced changes to SBA's 8(a) program and states that the proposed rule aims to remedy the effects of "unlawful diversity, equity, and inclusion programs or policies" and "unlawful affirmative action programs or policies." According to the notice, these policies and programs consist of "any government or private entity policies or programs that favored some groups over others on the basis of race," including race-based procedures previously available in the 8(a) program. Comments on the proposed rule are due July 13, 2026.

## 8(a) Business Development Program Origins

In 1978, Congress amended Section 8(a) of the Small Business Act (15 U.S.C. §637(a)), establishing a program that aims to help small "socially and economically disadvantaged" business owners overcome barriers to participating in federal contracting related to racial prejudice and bias. For eligible businesses, the 8(a) program creates federal contracting preferences, such as contract set-asides and sole-source contracts. In addition, the program provides business development support, such as mentorship, training, and counseling. For more information, see CRS Report R44844, *SBA's 8(a) Business Development Program: Legislative and Program History* (2024).

## Definition of "Socially Disadvantaged" Individual

The 1978 amendments to the Small Business Act defined socially and economically disadvantaged individuals, whose businesses are eligible for participation in the 8(a) program, as 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" (15 U.S.C. §637(a)(5)). The amendments contain

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congressional findings that such disadvantaged groups "include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities." Prior to July 2023, SBA assessed social disadvantage under regulations providing that business owners of listed ethnic and racial groups possess a rebuttable presumption of social disadvantage, while business owners who are members of other groups needed to establish their disadvantage, and hence 8(a) eligibility, through individualized, narrative evidence.

In a July 2023 case, *Ultima Servs. Corp. v. U.S. Department of Agriculture*, the U.S. District Court for the Eastern District of Tennessee found SBA's race-based presumption of social disadvantage for 8(a) program applicants to be unconstitutional. In particular, the court concluded that the government had not met the high evidentiary standard needed to support remedial, race-based decisionmaking under the Fifth Amendment's equal protection standard. After the ruling, SBA stopped using the regulation's racial presumption for 8(a) applicants. Individualized circumstances causing social disadvantage, documented through a personal narrative to SBA, became the foundation for every business owner's 8(a) program eligibility, regardless of race. SBA had previously used this procedure for applicants ineligible for its racial presumption of social disadvantage. For further information on this program change, see CRS Insight IN12245, *SBA's 8(a) Business Development Program Responds to District Court Ruling* (2023).

The SBA's June 2026 proposed rule would create a new "test by which any individual American citizen can establish social disadvantage," instead of requiring program applicants to submit a narrative describing their social disadvantage. According to the proposed rule, under the new test, an individual would need to show that

> during the citizen's lifetime, a governmental or private entity in the United States ... 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.

The applicant would also need to show that the "discrimination, bias, or favoritism conferred material harm on the citizen."

A program applicant could fulfill the test by self-certifying "group membership and individual harm" and providing "evidence of government or private entity discrimination or bias." Relevant discrimination or bias could include "unlawful diversity, equity, and inclusion programs or policies; unlawful affirmative action programs or policies; [or] race-based quotas, set-asides, or hiring targets." As one example, the agency cites a business owner's prior ineligibility for the 8(a) program's race-based rebuttable presumption (deemed unconstitutional in *Ultima Services*) as a circumstance an applicant could use to show discrimination. In the agency's view, the proposed rule would allow into the 8(a) program "a member of any racial, ethnic, or cultural group who has been targeted by any governmental or private entity's discrimination."

According to the proposed rule notice, SBA's new test for 8(a) eligibility "reduces the potential for subjectivity involved in the certification process" and preserves SBA's limited resources for program application review. The agency also states that the new rule would "remedy the previous unconstitutional implementation of the program," including "the federal government's unconstitutional discrimination against members of groups who were not subject to the Rebuttable Presumption." The notice asserts that the presumption "rendered white Americans almost totally unable to participate in the program" and that its benefits "for over 37 years were unconstitutionally distributed."

In addition to creating a new test for 8(a) applicants, the proposed rule would also amend SBA's regulations to remove the rebuttable presumption of social disadvantage for certain racial and ethnic groups, which currently remains despite not being in effect since the July 2023 district court decision. It would also remove the option for applicants to establish social disadvantage via an individualized determination, leaving the proposed new test as the only way of showing social disadvantage. The proposed rule would not affect entity-owned 8(a) participants, such as those owned by tribes.

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