



## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 124

[SBA-2026-0133]

RIN 3245-AI75

### **Reforms to Remove SBA’s 8(a) Program’s Rebuttable Presumption of Social Disadvantage for Individually Owned Firms Only; Reforms Do Not Impact Entity-Owned Firms**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Small Business Administration (“SBA” or “Agency”) proposes to amend its regulations to align the Section 8(a) Business Development Program (8(a) BD program) with constitutional requirements and the law. The proposed rule applies *only* to the 8(a) BD eligibility of small businesses owned and controlled by individuals. It does not in any way amend or affect the eligibility of entity-owned small businesses (i.e., those owned by tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations). Specifically, the proposed rule would amend SBA’s regulations to remove the rebuttable presumption that individuals belonging to certain designated groups are socially disadvantaged and set forth revised standards for individuals establishing social disadvantage.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** You may submit comments, identified by Docket No. SBA-2026-0133 or RIN 3245-AI75, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov> and follow the instructions for submitting comments.
- Mail (for paper submissions): Office of Government Contracting and Business Development, 409 Third Street SW, Washington, DC 20416.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.regulations.gov>, please submit the comments to [GCBDregs@sba.gov](mailto:GCBDregs@sba.gov) and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination as to whether the comments will be published or not.

**FOR FURTHER INFORMATION CONTACT:** Ryan Lambert, Associate Administrator of Government Contracting and Business Development, [GCBDregs@sba.gov](mailto:GCBDregs@sba.gov).

**SUPPLEMENTARY INFORMATION:**

I. Background and Need for Rule

Congress enacted the Small Business Act, 15 U.S.C. 631 *et seq.* (the “Act”) in 1953 to “aid, counsel, assist, and protect” small businesses, to ensure a “fair proportion” of government contracts go to small businesses, 15 U.S.C. 631a(a)-(b), and to “preserv[e]. . . the competitive free enterprise system.” *Id.* 631a(b). Among other provisions, the Act established the 8(a) BD program, which creates contracting preferences for small businesses owned and controlled by “socially and economically disadvantaged” individuals. 15 U.S.C. 637. The Act aims to award at least five percent of the total value of federal contracts to small disadvantaged businesses each year, and contracts awarded through the 8(a) BD program contribute to this goal. To be eligible to participate in the 8(a) BD program, the Small Business Act requires a small business concern to be at least 51% owned by (1) one or more socially and economically disadvantaged individuals, (2) an economically disadvantaged Indian tribe (or wholly owned subsidiary of a tribe), or (3) an economically disadvantaged Native Hawaiian Organization (NHO). 15 U.S.C. 637(a)(4)(A). The Small Business Act also provides that the term Indian tribe specifically includes Alaska Native Corporations (ANCs). 15 U.S.C. 637(a)(13). In addition, section 626(a)(2) of the Omnibus Reconciliation Act of 1981, Pub. L. 97-35, codified at 42 U.S.C.

9815(a)(2), authorizes small businesses that are at least 51% owned by a Community Development Corporation (CDC) to be eligible for the 8(a) BD program.

This proposed rule applies *only* to the 8(a) BD eligibility of small businesses owned and controlled by individuals. It does not in any way amend or affect the eligibility of entity-owned small businesses (i.e., those owned by tribes, ANCs, NHOs, or CDCs). Specifically, the proposed rule would amend SBA’s regulations to remove the rebuttable presumption that individuals belonging to certain designated groups are socially disadvantaged and set forth revised standards for individuals establishing social disadvantage.

For purposes of socially disadvantaged *individuals*, the Act defines such individuals 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). SBA regulations over time have added the requirement that the social disadvantage must have resulted from “circumstances beyond [the individual’s] control.” 13 CFR 124.103(a).

The regulations further provide that members of certain designated groups, including “Black Americans, Hispanic Americans, Native Americans . . . , Asian Pacific Americans . . . , Subcontinent Asian Americans . . . , and members of other groups designated from time to time by [the] SBA,” are entitled to a rebuttable presumption of being socially disadvantaged individuals (the “Rebuttable Presumption”). *Id.* § 124.103(b)(1). This presumption can be rebutted under the regulations with “credible evidence to the contrary.” *Id.* § 124.103(b)(3). As for individuals who are not members of such designated groups, they may show social disadvantage by submitting evidence that demonstrates individual disadvantage impacting their entry into or advancement in the business world, among other requirements. *Id.* § 124.103(c)(1)-(2).

In July 2023, a federal district court held that the regulatory Rebuttable Presumption violated the Fifth Amendment’s right to equal protection under the United States

Constitution. See *Ultima Servs. Corp. v. United States Dep't of Agric.*, 683 F. Supp. 3d 745, 774 (E.D.Tenn. 2023) (“*Ultima*”). That court thus enjoined the SBA from continuing to use the Rebuttable Presumption in administering the program. *Id.* On November 25, 2025, the Department of Justice advised the Speaker of the House, pursuant to 28 U.S.C. 530D, that the Rebuttable Presumption violates the Constitution and that the Department of Justice would no longer defend it in court. The Agency fully agrees that the Rebuttable Presumption is unconstitutional.

Since *Ultima*, SBA has made all social disadvantage determinations pursuant to the standard for non-presumptive applicants under 13 CFR 124.103(c). SBA recognizes, however, that from the time the regulatory Rebuttable Presumption was established in 1986 until its demise in 2023, the 8(a) BD program unconstitutionally categorized and favored certain individuals solely on the basis of race and ethnicity. Practically speaking, these regulations, both the text and its application, rendered white Americans almost totally unable to participate in the program. Further, this practical reality persisted until 2025 when certain related practices and policies were terminated.

SBA possesses broad statutory authority to establish and enforce regulations that govern the 8(a) BD program to ensure it meets its statutory objectives. Section 5(b)(6) of the Act, 15 U.S.C. 634(b)(6), grants to SBA the authority to prescribe regulations to carry out the purposes of the Act, which include ensuring that only eligible firms participate in SBA’s various programs and that the programs’ intended purposes are not subverted.

SBA is proposing to promulgate regulations to align the program with constitutional and statutory requirements and goals.

## II. Severability

SBA anticipates that any provision of this proposed rule, or ultimate final rule, held to be invalid or unenforceable shall be construed so as to continue to give the maximum effect to such provision as permitted by law, unless such holding is that the provision of this proposed, or

ultimate final rule, is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof.

### III. Analysis

#### Section 124.103

As discussed above, SBA's regulations contain an unconstitutional race-based Rebuttable Presumption that was in place from 1986 until its demise in 2023 when a federal court declared it unconstitutional. *See Ultima*. Moreover, an increasing number of voices have begun to question whether the 8(a) BD program statute is itself a race-based classification for socially and economically disadvantaged individuals which should be subject to strict scrutiny. *See, e.g., Rothe Dev., Inc. v. United States DOD*, 836 F.3d 57 (2016) (Henderson, J., concurring in part and dissenting in part). Similarly worded statutes have faced legal challenges that were only abandoned when the analogous language was removed. *See, e.g., Holman v. Vilsack*, 117 F.4th 906 (6th Cir. 2024) (overturned on other grounds).

The benefits of the 8(a) BD program, which for over 37 years were unconstitutionally distributed as it relates to socially disadvantaged individuals, are not small. Since its inception, the 8(a) BD program has been responsible for hundreds of billions of dollars in government contracts. Based upon the Administrator's authority under the Small Business Act, including but not limited to 15 U.S.C. 634(b)(6) and 15 U.S.C. 637(a)(8), the SBA is proposing a number of changes to the social disadvantage regulatory framework for individuals. These changes are intended to remedy the previous unconstitutional implementation of the program, to align the program's implementation with statutory requirements, and to address concerns about the constitutionality of the remaining program. SBA proposes amending 13 CFR 124.103 through four targeted changes.

First, SBA proposes revising 13 CFR 124.103 to align with the statutory text in 15 U.S.C. 637(a)(5) and the related purpose section. *see* 15 U.S.C. 631(f)(1)(B).

Second, SBA proposes replacing the current regulatory tests for social disadvantage with a new test. Specifically, SBA proposes a test by 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 or 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. Examples of such discrimination would include, but are not limited to: unlawful diversity, equity, and inclusion programs or policies; unlawful affirmative action programs or policies; race-based quotas, set-asides, or hiring targets; or, any government or private entity policies or programs that favored some groups over others on the basis of race. To provide two specific examples, an individual American citizen may establish that his or her group experienced discrimination, bias, or harm by showing evidence that his or her group experienced a barrier to accessing a federal program or contract that other designated groups did not (e.g., was not eligible for the Rebuttable Presumption in violation of the Constitution), or that that the citizen's racial or ethnic group was disadvantaged in college or university admissions decisions or otherwise discriminated against by a private entity in an unlawful manner as contemplated in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), *Ames v. Ohio Department of Youth Services*, 605 U.S. 303 (2025) or similar cases.

To establish the American citizen was himself or herself harmed by such discrimination, prejudice, or bias, the citizen may self-certify that he or she was a member of the relevant group at the time of the government's or private entity's action or during the effective period of the relevant action, policy, rule, regulation, or other practice, and that such action, policy, rule, regulation, or other practice materially harmed the citizen. For example, the individual could

have sought a benefit (e.g., access to a federal, state or local government program) and have been denied.

Third, SBA proposes revising 13 CFR 124.103(c) by removing the current non-presumptive test for social disadvantage, rendering the new test in 13 CFR 124.103(b) the sole test for social disadvantage.

Fourth, SBA proposes removing the process for group inclusion on the Rebuttable Presumption list under 13 CFR 124.103(d) because SBA proposes removing the Rebuttable Presumption altogether.

SBA recognizes that its proposed test for social disadvantage is a departure from the current regulatory test for establishing social disadvantage. SBA believes that this new test would not only remedy the federal government's unconstitutional discrimination against members of groups who were not subject to the Rebuttable Presumption, but will also allow into the 8(a) BD program a member of any racial, ethnic, or cultural group who has been targeted by any governmental or private entity's discrimination and who has been harmed by such targeting. SBA believes it is appropriate to require evidence of government or private entity discrimination or bias so that program eligibility is underscored by objective criteria. SBA further believes self-certification of group membership and individual harm would appropriately balance requiring individual harm while also preserving the statute's group-based construction and SBA's limited resources.

In proposing these social disadvantage changes, SBA considered maintaining the individual test for social disadvantage under the current 13 CFR 124.103(c) as an alternative means to establish social disadvantage but rejected that option. SBA believes that its limited resources are best served through its proposed social disadvantage test because it does not require an individualized narrative of personal disadvantage that opens the program to abuses and unconstitutional discrimination.

SBA seeks comment on its proposed test. While SBA does not currently intend to apply the new test to current Participants at their next annual review, SBA requests comment on any reliance interests that would be implicated by these proposed changes.

Compliance with Executive Orders 12866, 12988, 13132, 13563, and 14192, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)  
Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. OMB has determined that this rule will be a significant regulatory action and, therefore, is subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, though it is not an “economically significant” action. Accordingly, this rule has been submitted to OMB for review. SBA invites comments on its Cost-Benefit Analysis.

#### Cost-Benefit Analysis

1) *Is there a need for the regulatory action?*

This rulemaking is necessary to comply with the court order in *Ultima* enjoining SBA from using the Rebuttable Presumption of social disadvantage in administering the 8(a) BD program for socially disadvantaged individuals. SBA recognizes that from the time the regulatory Rebuttable Presumption was established in 1986 until its demise in 2023, the 8(a) BD program unconstitutionally categorized and favored individuals from certain groups solely on the basis of race and ethnicity. This proposed regulation is necessary to align the program with constitutional and statutory requirements and goals.

2) *What are the incremental benefits and costs of this regulatory action?*

There are no quantifiable costs or benefits associated with this regulatory change. This rule amends the 8(a) BD regulations to clarify the manner in which individuals may establish their social disadvantage. This rulemaking does not affect participants currently admitted to the 8(a) BD program. Further, the rule has no effect on the amount or dollar value of any federal contract requirements or of any financial assistance provided through SBA. Therefore, the rule is not likely to have an effect on the economy, result in an increase in costs or prices, or have a significant adverse effect on competition.

This proposed rule only impacts only individually owned applicants to the 8(a) BD program. Based on FY25 data, SBA estimates that approximately 4,190 applicants to the 8(a) BD program will be affected by this rule change annually. This rule will have a *de minimis* impact on these applicants. Absent this proposed rule, individual applicants would continue to be required to submit a narrative to demonstrate they are socially disadvantaged. Under the proposed revisions, an applicant will instead self-certify that he or she a) was a member of a particular group at the time of the governmental or private entity's action or during the effective period of the relevant action, policy, rule, regulation, or other practice; and b) suffered material harm because of that action, policy, rule, regulation, or other practice. The applicant must also show evidence that the government or private entity's action, policy, rule, regulation or other practice favored other groups, excluding the citizen's group, or disadvantaged the citizen's group or that the government or private entity took adverse actions against or otherwise disfavored the citizen's group. Given that the applicant had to previously provide a narrative to show social disadvantage, any change in the burden to comply with the proposed regulation is expected to be *de minimis*. It should take an applicant approximately the same amount of time to prepare a narrative as it would to self-certify and find and submit evidence. There are no additional costs, sunk costs, or transition costs for new applicants.

There are two chief benefits to this rule that cannot be quantified. First, this rule brings SBA's regulations in line with the Constitution and the court's decision in *Ultima*, removing any

legal uncertainty surrounding how to establish social disadvantage for individuals. Second, by updating the regulations, SBA is providing clarity to potential applicants that the Rebuttable Presumption is no longer a means for establishing social disadvantage for individuals.

3) *What are the alternatives to this rulemaking?*

One alternative is to make no changes to SBA's current regulations. As a court order has ruled the presumption of social disadvantage for individuals unconstitutional, it is necessary for SBA to revise the test for social disadvantage for individuals under its regulations. Therefore, leaving the regulation in its current form is not a reasonable alternative to this rulemaking.

SBA considered removing the unconstitutional language from its regulations while leaving in place the current test for individuals to establish their social disadvantage. However, SBA feels that the test in this proposed rule is superior to the existing test requiring the submission of a social disadvantage narrative because the proposed test reduces the potential for subjectivity involved in the certification process.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This proposed rule does not have federalism implications as defined in Executive Order 13132. It would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such, it does not warrant the preparation of a Federalism Assessment.

Executive Order 14192

This proposed rule is not an Executive Order 14192 regulatory action, because it does not impose any more than de minimis regulatory costs. SBA is revising one section of the Code of

Federal Regulations to comply with the Constitution. There are no budgetary impacts as a result of the proposed revision, and pursuant to the above cost-benefit analysis, the annualized costs attributable to this rule for purposes of E.O. 14192 accounting are \$0. SBA notes that the principal benefits from this action are qualitative – the removal of unconstitutional regulatory provisions reduces legal uncertainty and improves regulatory clarity.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

The SBA has determined that this proposed rule, when finalized, would alter the currently approved reporting and recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. This proposed rule would revise what applicants to the 8(a) BD program must submit in order to be considered socially disadvantaged. This rule will not impact the annual burden of the collection.

***Summary of Information Collection:***

SBA proposes to revise the information collection identified below:

*OMB Control No.:* 3245-0374

*Title:* Unified Certification System

*Description of Respondents:* Small business concerns applying for SBA certification

*Form Number:* SBA Form 2413

*Total Estimated Annual Responses:* 29,329

*Total Estimated Annual Hour Burden:* 39,330

SBA has submitted this amended collection to the Office of Management and Budget for review, and invites the public to comment on the proposed changes, particularly on: (a) whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Regulatory Flexibility Act, 5 U.S.C. 601-612

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule impacts only individually owned applicants to the 8(a) BD program. In FY25, SBA received approximately 4,190 applicants to the 8(a) BD program and estimates a similar number will be affected by this rule change annually. While this represents a substantial number of applicants in the 8(a) BD program, it makes up a small proportion of the approximately 21,000 applications SBA received in FY25 for all of its small business certification programs. As discussed in the cost-benefit analysis, SBA has determined that any economic impact on small entities will be de minimis. Applicants are currently required to provide a narrative showing that they are socially disadvantaged. This new test replaces the existing test without increasing the burden on participants. This rule does not change the total dollar amount available to contractors through the 8(a) BD program.

For the reasons discussed, SBA certifies that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. SBA invites comments from members of the public on its analysis and certification.

#### **List of Subjects in 13 CFR Part 124**

Administrative practice and procedure, Government procurement, Government property, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR part 124 as follows:

**PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS**

1. The authority citation for part 124 continues to read as follows:

**Authority:** 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644, 42 U.S.C. 9815; and Pub. L. 99-661, 100 Stat. 3816; Sec. 1207, Pub. L. 100-656, 102 Stat. 3853; Pub. L. 101-37, 103 Stat. 70; Pub. L. 101-574, 104 Stat. 2814; Sec. 8021, Pub. L. 108-87, 117 Stat. 1054; and Sec. 330, Pub. L. 116-260.

2. Revise § 124.103 to read as follows:

**§ 124.103 Who is socially disadvantaged?**

(a) *General.* Socially 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. The social disadvantage must stem from circumstances beyond their control.

(b) *Victims of government and private entity discrimination or bias.* (1) For purposes of this section:

(i) *Citizen* means citizen of the United States.

(ii) *Material harm* means loss of access to or diminished opportunities related to economic advancement.

(2) A citizen may establish social disadvantage by first showing that during the citizen's lifetime, a governmental or private entity in the United States, including but not limited to any federal, state or local government, university or 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. In addition, the citizen must establish that such discrimination, bias, or favoritism conferred material harm on the citizen.

(3) In order to establish his or her social disadvantage, a citizen must:

(i) Self-certify that he or she:

(A) Was a member of a particular group at the time of the governmental or private entity's action or during the effective period of the relevant action, policy, rule, regulation, or other practice; and

(B) Suffered material harm because of the action, policy, rule, regulation, or other practice evidenced in paragraph (b)(3)(ii) of this section; and

(ii) Show evidence that the government's or private entity's action, policy, rule, regulation or other practice favored other groups, excluding the citizen's group, or disadvantaged the citizen's group or that the government or private entity took adverse actions against or otherwise disfavored the citizen's group. Such actions, policies, rules, regulations, or other practices favoring or disfavoring groups may include, but are not limited to: unlawful diversity, equity, and inclusion programs or policies; unlawful affirmative action programs or policies; race-based quotas, set-asides, or hiring targets; or, any policies or programs that favored some groups over others on the basis of race. As two specific examples:

(A) Such actions, policies, rules, regulations, or other practices include prior iterations of 13 CFR 124.103 that excluded the Citizen's racial or ethnic group as a group entitled to a rebuttable presumption of social disadvantage; and

(B) Such actions, policies, rules, regulations, or other practices also include situations where the citizen's group was disadvantaged in college or university admissions decisions or otherwise discriminated against by a private entity in an unlawful manner.

(4) Sufficient evidence under paragraph (b)(3)(ii) of this section may include, but is not limited to: materials on government, university and corporate websites; government, university, and corporate policies, regulations, guidance, procedures or documents; statements by

government, university or corporate officials; government, university, and corporate reports, audits or findings; court decisions; or, administrative rulings.

**Kelly Loeffler,**

*Administrator.*

[FR Doc. 2026-11765 Filed: 6/10/2026 8:45 am; Publication Date: 6/11/2026]