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SBA's "8(a) Program": Overview, History, and Current Issues

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Summary

The Minority Small Business and Capital Ownership Development Program—commonly known as the "8(a) Program"—provides participating small businesses with training, technical assistance, and contracting opportunities in the form of set-aside and sole-source awards. A *set-aside* award is a contract in which only certain contractors may compete, whereas a *sole-source* award is a contract awarded, or proposed for award, without competition. In FY2017, 3,421 8(a) firms were awarded more than $27.1 billion in federal contracts, including $8.0 billion in 8(a) set-aside awards and $8.4 billion in 8(a) sole-source awards. Other programs provide similar assistance to other types of small businesses (e.g., women-owned, HUBZone, and service-disabled veteran-owned).

8(a) Program eligibility is generally limited to small businesses "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States" that demonstrate "potential for success."

Members of certain racial and ethnic groups are presumed to be *socially disadvantaged*, although individuals who do not belong to these groups may prove they are also socially disadvantaged. To be *economically disadvantaged*, an individual must have a net worth of less than $250,000 (excluding ownership in the 8(a) firm and equity in his or her primary residence) at the time of entry into the program. This amount increases to $750,000 for continuing eligibility. In determining whether an applicant has *good character*, the SBA takes into account any criminal conduct, violations of SBA regulations, or debarment or suspension from federal contracting. For a firm to demonstrate *potential for success*, it generally must have been in business in its primary industry classification for two years immediately prior to applying to the program. However, small businesses owned by Alaska Native Corporations, Community Development Corporations, Indian tribes, and Native Hawaiian Organizations are eligible to participate in the 8(a) Program under somewhat different terms. Each of these terms is further defined by the Small Business Act, Small Business Administration (SBA) regulations, and judicial and administrative decisions.

This report examines the 8(a) Program's historical development, key requirements, administrative structures and operations, and the SBA's oversight of 8(a) firms. It also discusses two SBA programs designed to support 8(a) firms, the 7(j) Management and Technical Assistance Program and the 8(a) Mentor-Protégé Program, and provides various program statistics. It concludes with an analysis of the following current 8(a) Program issues:

- The SBA's decision to address recent declines in the number of program participants by revising and streamlining the program's application process, an action which the SBA's Office of Inspector General (SBA OIG) reports "may erode core safeguards that prevented questionable firms from entering the 8(a) Program."
- Reported variation in 8(a) Program service delivery.
- Reported deficiencies in the oversight of 8(a) Program participant's continuing eligibility.
- Disagreements concerning the financial thresholds used to determine economic disadvantage, including the SBA's decision to exclude equity in a primary residence from the calculation of an individual's net worth.
- The adequacy of the performance measures used to evaluate the program's effectiveness in meeting its statutory goals.

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Introduction

The Minority Small Business and Capital Ownership Development Program—commonly known as the "8(a) Program"—provides participating small businesses with training and technical assistance designed to enhance their ability to compete effectively in the private marketplace.[1] One of the program's major benefits is that 8(a) firms can receive federal contracting preferences in the form of set-aside and sole-source awards. A *set-aside* award is a contract in which only certain contractors may compete, whereas a *sole-source* award is a contract awarded, or proposed for award, without competition. As a business development program, its overall goal is for 8(a) firms to graduate from the program and continue to do well in a competitive business environment.

8(a) Program eligibility is generally limited to small businesses which are "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States" and demonstrate "potential for success."[2] However, small businesses owned by Alaska Native Corporations (ANCs), Community Development Corporations (CDCs), Indian tribes, and Native Hawaiian Organizations (NHOs) are also eligible to participate in the 8(a) Program under somewhat different terms. In FY2017, 3,421 8(a) firms were awarded more than $27.1 billion in federal contracts, including $8.0 billion in 8(a) set-aside awards and $8.4 billion in 8(a) sole-source awards.[3] Other programs provide similar assistance to other types of small businesses (e.g., women-owned, HUBZone, and service-disabled veteran-owned).

Congress has a perennial interest in small business programs, including the 8(a) Program. As stated in the Small Business Act

> It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.[4]

The Small Business Act also indicates "that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy."[5] To help achieve these goals, the 8(a) Program's stated statutory purposes are to

> (A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;

[1] The 8(a) Program takes its name from one of the sections of the Small Business Act that authorizes it. The program is also governed by Section 7(j) of the act.

[2] 13 C.F.R. §124.101.

[3] U.S. General Services Administration (GSA), "Federal Procurement Data System—Next Generation," accessed on March 15, 2018, at https://www.fpds.gov/fpdsng_cms/index.php/en/.

[4] P.L. 85-536, Small Business Act of 1958, §2(a), 72 Stat. 384 (July 18, 1958) (codified at 15 U.S.C. §631(a)).

[5] P.L. 85-536, §2(f)(1)(a), 72 Stat. 384 (July 18, 1958) (codified at 15 U.S.C. §631(f)(1)(a)).

> (B) promote the competitive viability of such concerns in the marketplace by providing such available contract, financial, technical, and management assistance as may be necessary; and
>
> (C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.[6]

Recent Congresses have had particular interest in the 8(a) Program largely because of its effects on minority-owned small businesses and small businesses' overall role in job creation.[7]

8(a) business development assistance has many forms, including business counseling and mentoring, both in online and traditional face-to-face settings; access to capital and surety bond guarantees; contract marketing guidance; and assistance with acquiring federal government surplus property. In addition, the Small Business Administration (SBA) reviews and certifies eligible clients; assigns SBA personnel (Business Opportunity Specialists, BOSs) to monitor and measure each firm's progress through annual reviews, business planning collaboration, and systematic evaluations; helps to identify potential contract opportunities; and markets each firm's technical capabilities to federal agency procurement officials.

This report examines the 8(a) Program's historical development, key requirements, administrative structures and operations, and the SBA's oversight of 8(a) firms. It also discusses two SBA programs designed to support 8(a) firms, the 7(j) Management and Technical Assistance Program and the 8(a) Mentor-Protégé Program, and provides various program statistics.[8]

It concludes with an analysis of the following current 8(a) Program issues:

- The SBA's decision to address recent declines in the number of program participants by revising and streamlining the program's application process, an action which the SBA's Office of Inspector General (SBA OIG) reports "may erode core safeguards that prevented questionable firms from entering the 8(a) Program."[9]
- Reported variation in 8(a) Program service delivery.
- Reported deficiencies in the oversight of 8(a) Program participant's continuing eligibility.
- Disagreements concerning the financial thresholds used to determine economic disadvantage, including the SBA's decision to exclude equity in a primary residence from the calculation of an individual's net worth.[10]
- The adequacy of the performance measures used to evaluate the program's effectiveness in meeting its statutory goals.

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[6] P.L. 85-536, §2(f)(2)(A-C), 72 Stat. 384 (July 18, 1958) (codified at 15 U.S.C. §631(f)(2)(A-C)).

[7] See CRS Report R41523, *Small Business Administration and Job Creation*, by Robert Jay Dilger and CRS Report R40985, *Small Business: Access to Capital and Job Creation*, by Robert Jay Dilger.

[8] For additional information and analysis of federal Mentor-Protégé programs, see CRS Report R41722, *Small Business Mentor-Protégé Programs*, by Robert Jay Dilger.

[9] U.S. Small Business Administration (SBA), Office of Inspector General (SBA OIG), *Report on the Most Serious Management and Performance Challenges in Fiscal Year 2017*, Report Number 17-02, October 14, 2016, p. 11, at https://www.sba.gov/sites/default/files/oig/FY_2017_-_Management_Challenges_-_10_14_16_7.pdf.

[10] Ibid., p. 12.

Historical Development

Program Origins

The current 8(a) Program is the result of the merger of two distinct types of federal programs: those seeking to assist small businesses in general and those seeking to assist racial and ethnic minorities. The merger first occurred, as a matter of executive branch practice, in 1967 and was given a statutory basis in 1978.

Federal Programs for Small Businesses

In 1942, Congress first authorized a federal agency to enter into prime contracts with other agencies and subcontract with small businesses for the performance of these contracts. The agency was the Smaller War Plants Corporation (SWPC), which was partly created for this purpose, and Congress gave it these powers to ameliorate small businesses' financial difficulties while "mobiliz[ing] the productive facilities of small business in the interest of successful prosecution of the war."[11] The SWPC's subcontracting authority expired along with the SWPC at the end of the World War II. However, in 1951, at the start of the Korean War, Congress created the Small Defense Plants Administration (SDPA), which was generally given the same powers that the SWPC had exercised.[12] Two years later, in 1953, Congress transferred the SDPA's subcontracting authorities, among others, to the newly created SBA,[13] with the intent that the SBA would exercise these powers in peacetime, as well as in wartime.[14] When the Small Business Act of 1958 transformed the SBA into a permanent agency, this subcontracting authority was included in Section 8(a) of the act.[15] At its inception, the SBA's subcontracting authority was not limited to small businesses owned and controlled by the socially and economically disadvantaged. Under the original Section 8(a), the SBA could contract with any "small-business concerns or others,"[16] but it reportedly seldom, if ever, employed this subcontracting authority, focusing instead upon its loan and other programs.[17]

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[11] P.L. 77-603, Small Business Mobilization Act, §4(f), 56 Stat. 351 (June 11, 1942).

[12] P.L. 82-96, An Act To amend and extend the Defense Production Act of 1950 and the Housing and Rent Act of 1947, as amended, §110, 65 Stat. 131 (July 31, 1951).

[13] P.L. 83-163, Reconstruction Finance Corporation Liquidation Act, §207(c)-(d), 67 Stat. 230 (July 30, 1953).

[14] See U.S. Congress, House Committee on Banking and Currency, *Small Business Act of 1953*, report to accompany H.R. 5141, 83rd Cong., 1st sess., May 28, 1953, H. Rept. 83-494 (Washington: GPO, 1953), p. 2 (stating that the SBA would "continue many of the functions of the [SDPA] in the present mobilization period and in addition would be given powers and duties to encourage and assist small-business enterprises in peacetime as well as in any future war or mobilization period"); and U.S. Congress, Senate Committee on Banking and Currency, *Small Business Act*, report to accompany H.R. 7963, 85th Cong., 2nd sess., June 16, 1958, pp. 9, 10 (stating that the act would "put the procurement assistance program on a peacetime basis").

[15] P.L. 85-536, as amended, §8(a)(1)-(2), 72 Stat. 384 (July 18, 1958).

[16] Ibid.

[17] Thomas Jefferson Hasty, III, "Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (Is There a) Future?," 145 *Military Law Review* pp. 1, 8 (Summer 1994). ("[B]ecause the SBA believed that the efforts to start and operate an 8(a) program would not be worthwhile in terms of developing small business, the SBA's power to contract with other government agencies essentially went unused. The program actually lay dormant for about fifteen years until the racial atmosphere of the 1960s provided the impetus to wrestle the SBA's 8(a) authority from its dormant state.")

Federal Programs for Racial and Ethnic Minorities

Federal programs for racial and ethnic minorities began developing at approximately the same time as those for small businesses, although there was initially no explicit overlap between them. The earliest programs were created by executive orders, beginning with President Franklin Roosevelt's order on June 25, 1941, requiring that all federal agencies include a clause in defense-related contracts prohibiting contractors from discriminating on the basis of "race, creed, color, or national origin."[18] Subsequent Presidents followed Roosevelt's example, issuing a number of executive orders seeking to improve the employment opportunities for various racial and ethnic groups.[19] These executive branch initiatives took on new importance after the Kerner Commission's report on the causes of the 1966 urban riots concluded that African Americans would need "special encouragement" to enter the economic mainstream.[20]

Presidents Lyndon Johnson and Richard Nixon laid foundations for the present 8(a) Program in the hope of providing such "encouragement." Johnson created the President's Test Cities Program (PTCP), which involved a small-scale use of the SBA's authority under Section 8(a) to award contracts to firms willing to locate in urban areas and hire unemployed individuals, largely African Americans, or sponsor minority-owned businesses by providing capital or management assistance.[21] However, under the PTCP, small businesses did not have to be minority-owned to receive subcontracts under Section 8(a).[22] Nixon's program was larger and focused more specifically on minority-owned small businesses.[23] During the Nixon Administration, the SBA promulgated its earliest regulations for the 8(a) Program. In 1970, the first of these regulations articulated the SBA's policy of using Section 8(a) to "assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place."[24] A later regulation, promulgated in 1973, defined *disadvantaged persons* as including, but not limited to, "black Americans, Spanish-Americans, oriental Americans, Eskimos, and Aleuts."[25] However, the SBA lacked explicit statutory authority for focusing its 8(a) Program on minority-owned businesses until 1978,[26] although courts generally

[18] Executive Order No. 8802, "Reaffirming Policy of Full Participation in the Defense Program by All Persons, Regardless of Race, Creed, Color, or National Origin, and Directing Certain Action in Furtherance of Said Policy," 6 *Federal Register* 3109, June 25, 1941. Similar requirements were later imposed on nondefense contracts. See Executive Order No. 9346, "Further Amending Executive Order No. 8802 by Establishing a New Committee on Fair Employment Practice and Defining its Powers and Duties," 8 *Federal Register* 7182, May 29, 1943.

[19] See Executive Order No. 10308, "Improving the Means for Obtaining Compliance With the Nondiscrimination Provisions of Federal Contracts," 16 *Federal Register* 12303, December 3, 1951 (Truman); Executive Order No. 10557, "Approving the Revised Provision in Government Contracts Relating to Nondiscrimination in Employment," 19 *Federal Register* 5655, September 3, 1954 (Eisenhower); Executive Order No. 10925, "Establishing the President's Committee on Equal Employment Opportunity," 26 *Federal Register* 1977, March 6, 1961 (Kennedy); and Executive Order No. 11458, "Prescribing Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise," 34 *Federal Register* 4937, March 7, 1969 (Nixon).

[20] The National Advisory Commission on Civil Disorders (known as the Kerner Commission after its chair, Governor Otto Kerner, Jr. of Illinois), *Report of the National Advisory Commission on Civil Disorders* (U.S. GPO, 1968), p. 21.

[21] See Thomas Jefferson Hasty, III, "Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (Is There a) Future?," 145 *Military Law Review*, pp. 11, 12.

[22] See Jonathan J. Bean, *Big Government and Affirmative Action: The Scandalous History of the Small Business Administration* (Lexington, KY: University Press of Kentucky, 2001), p. 66.

[23] See Executive Order No. 11625, "Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise," 36 *Federal Register* 19967, October 13, 1971.

[24] 13 C.F.R. §124.8-1(b) (1970).

[25] 13 C.F.R. §124.8(c) (1973).

[26] U.S. Congress, Senate Select Committee on Small Business, *Amending the Small Business Act and the Small*

rejected challenges alleging that SBA's implementation of the program was unauthorized because it was "not specifically mentioned in statute."[27]

1978 Amendments to the Small Business Act and Subsequent Regulations

In 1978, Congress amended the Small Business Act to give the SBA express statutory authority for its 8(a) Program for minority-owned businesses.[28] Under the 1978 amendments, the SBA can only subcontract under Section 8(a) with "socially and economically disadvantaged small business concerns,"[29] or businesses that are least 51% owned by one or more socially and economically disadvantaged individuals and whose management and daily operations are controlled by such individual(s).[30]

The 1978 amendments established a basic definition of *socially disadvantaged individuals*, which included 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."[31] They also included congressional findings that "Black Americans, Hispanic Americans, Native Americans, and other minorities" are socially disadvantaged.[32] Thus, if an individual was a member of one of

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Business Investment Act of 1958, 95th Cong., 2nd sess., August 8, 1978, S. Rept. 95-1070 (Washington: GPO, 1978), p. 14 ("One of the underlying reasons for the failure of this effort is that the program has no legislative basis."); and U.S. Congress, House Committee on Small Business, *Amending the Small Business Act and the Small Business Investment Act of 1958*, report to accompany H.R. 11318, 95th Cong., 2nd sess., March 13, 1978, H. Rept. 95-949 (Washington: GPO, 1978), p. 4 ("Congress has never extended legislative control over the activities of the 8(a) program, save through indirect appropriations, thereby permitting program operations.… [The] program is not as successful as it could be.").

[27] See Ray Billie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 703-04 (5th Cir. 1973). In this case, the court particularly noted that the SBA's program was supported by congressional and presidential mandates issued after enactment of the Small Business Act in 1958. Ibid., p. 705.

[28] P.L. 95-507, To amend the Small Business Act and the Small Business Investment Act of 1958, 92 Stat. 1757 (October 24, 1978).

[29] Ibid. at §202.

[30] Ibid. (codified at 15 U.S.C. §637(a)(4)(A)-(B)). Firms that are owned and controlled by Indian tribes, ANCs, or NHOs were later included within the definition of a "socially and economically disadvantaged small business concern."

[31] Ibid. (codified at 15 U.S.C. §637(a)(5)).

[32] Ibid. at §201 (codified, as amended, at 15 U.S.C. §631(f)(1)(C)). The meaning of *socially disadvantaged individuals* was the subject of much debate at that time. Some Members of Congress viewed the 8(a) Program as a program for African Americans and would have defined *social disadvantage* accordingly. See Parren J. Mitchell, "Federal Affirmative Action for MBE's: An Historical Analysis," 1 *National Bar Association Magazine* 46 (1983). (Mitchell was a Member of the U.S. House of Representatives and leader of the Congressional Black Caucus at that time.). Others favored including both African Americans and Native Americans arguing that only those who did not come to the United States seeking the "American dream" should be deemed socially disadvantaged. See U.S. Congress, House Committee on Small Business, Minority Enterprise and General Oversight, *General Review of Major SBA Programs and Activities*, 95th Cong., 2nd sess., June 20, 1978, H721-41 (Washington: GPO, 1978), p. 21. Yet others suggested that groups that are not racial or ethnic minorities, such as women, should be able to qualify as "socially disadvantaged," or that individuals ought to be able to prove they are personally socially disadvantaged even if they are not racial or ethnic minorities. See U.S. Congress, House Committee on Small Business, *Amending the Small Business Act and the Small Business Investment Act of 1958*, report to accompany H.R. 11318, 95th Cong., 2nd sess., March 13, 1978, H. Rept. 95-949 (Washington: GPO, 1978), p. 9. The House-passed version of the bill defined socially disadvantaged individuals, in part, by establishing a rebuttable presumption that African Americans and Hispanic Americans are socially disadvantaged, but the Senate-passed bill did not reference any racial or ethnic groups in defining social disadvantage. See U.S. Congress, House Committee of Conference, *Amending the Small Business Act and the Small Business Investment Act of 1958*, report to accompany H.R. 11318, 95th Cong., 2nd sess., October 4, 1978, Conf. Rept. 95-1714 (Washington: GPO, 1978), p. 20; and U.S. Congress, Senate Select Committee on Small Business, *Amending the Small Business Act and the Small Business Investment Act of 1958*, 95th Cong., 2nd sess., August 8, 1978, S. Rept. 95-1070 (Washington: GPO, 1978), pp. 13-16. The conference committee reconciling the House and Senate versions ultimately arrived at a definition of socially disadvantaged individuals that included "those who have been subjected to racial or

these groups, he or she was presumed to be socially disadvantaged. Otherwise, the amendments were generally seen to grant the SBA discretion to recognize additional groups or individuals as socially disadvantaged based upon criteria promulgated in regulations.[33] Under these regulations, which include a three-part test for determining whether minority groups not mentioned in the amendment's findings are disadvantaged,[34] the SBA recognized the racial or ethnic groups listed in **Table 1** as socially disadvantaged for 8(a) purposes.[35] The regulations also established standards of evidence to be met by individuals demonstrating personal disadvantage and procedures for rebutting the presumption of social disadvantage accorded to members of recognized minority groups.[36]

Table 1. Groups Presumed to Be Socially Disadvantaged

Group	Countries of Origin Included Within Group
Black Americans	n/a
Hispanic Americans	n/a
Native Americans (including American Indians, Eskimos, Aleuts, Native Hawaiians)	n/a
Asian Pacific Americans	Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia, Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru
Subcontinent Asian Americans	India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, Nepal

Source: Congressional Research Service, based on 13 C.F.R. §124.103(b).

ethnic prejudice or cultural bias because of their identity as a member of a group." See P.L. 95-507, at §202. The conference committee also included congressional findings that "Black Americans, Hispanic Americans, Native Americans, and other minorities" are socially disadvantaged. Ibid. at §201. Congress subsequently added "Asian Pacific Americans" and "Native Hawaiian Organizations" to the groups whom it finds to be socially disadvantaged. See 15 U.S.C. §631(f)(1)(C)).

[33] P.L. 95-507, at §201 (stating that the groups Congress finds to be socially disadvantaged include, but are not limited to, those specified here); Ibid. at §202 (authorizing the award of contracts to socially disadvantaged individuals); and U.S. Congress, House Committee on Small Business, *Amending the Small Business Act and the Small Business Investment Act of 1958*, report to accompany H.R. 11318, 95th Cong., 2nd sess., March 13, 1978, H. Rept. 95-949 (Washington: GPO, 1978), p. 9 (expressing the view that §201 and §202 of the bill provide "sufficient discretion … to allow SBA to designate any other additional minority group or persons it believes should be afforded the presumption of social … disadvantage").

[34] See 13 C.F.R. §124.103(d)(2)(i)-(iii)(1980).

[35] 13 C.F.R. §124.103(b). Different groups are sometimes recognized as socially disadvantaged for purposes of other programs, such as those of the Department of Commerce's Minority Business Development Agency (MBDA). See 15 C.F.R. §1400.1(b). The SBA has rejected petitions from certain groups, including Hasidic Jews, women, disabled veterans, and Iranian-Americans. See George R. La Noue and John C. Sullivan, "Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences," 41 *Santa Clara Law Review* 103, 127-129 (2000). However, Hasidic Jews are eligible to receive assistance from the MBDA, whereas women are deemed to be disadvantaged for purposes of the Department of Transportation's Disadvantaged Business Enterprise (DBE) program. See 49 U.S.C. §47113(a)(2) (DBE program); and 15 C.F.R. §1400.1(c) (MBDA program).

[36] 13 C.F.R. §124.103(c)(2) (standards of evidence for showing personal disadvantage); and 13 C.F.R. §124.103(b)(3) (mechanisms for overcoming the presumption of social disadvantage).

The 1978 amendments also defined *economically disadvantaged individuals*, for purposes of the 8(a) Program, as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[37] In 1989, the SBA established by regulation that personal net worth of less than $250,000 at the time of entry into the program ($750,000 for continuing eligibility) constitutes economic disadvantage.[38] As will be discussed, these financial thresholds have not been adjusted for inflation.

Adding "Disadvantaged" Groups

Although the 8(a) Program was originally established for the benefit of disadvantaged *individuals*, in the 1980s, Congress expanded the program to include small businesses owned by four disadvantaged *groups*.

The first owner-group to be included was Community Development Corporations (CDCs). A CDC is

> a nonprofit organization responsible to residents of the area it serves which is receiving financial assistance under part A of this subchapter [42 U.S.C. §§9805 *et seq*.] and any organization more than 50 percent of which is owned by such an organization, or otherwise controlled by such an organization, or designated by such an organization for the purpose of this subchapter [42 U.S.C. §§9801 *et seq*.].[39]

Congress created CDCs with the Community Economic Development Act of 1981 and instructed the SBA to issue regulations ensuring that CDCs could participate in the 8(a) Program.[40]

In 1986, two additional owner-groups, Indian tribes and Alaska Native Corporations (ANCs), became eligible for the program when Congress passed legislation providing that firms owned by Indian tribes, which include ANCs, were to be deemed socially disadvantaged for 8(a) Program purposes.[41] In 1992, ANCs were further deemed to be "economically disadvantaged."[42]

The final owner-group, Native Hawaiian Organizations (NHOs), was recognized in 1988.[43] An NHO is defined as

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[37] P.L. 95-507, at §202.

[38] SBA, "Minority Small Business and Capital Ownership Development Program: Final Rule," 54 *Federal Register* 34692, August 21, 1989 (codified, as amended, at 13 C.F.R. §124.104(c)). Some commentators have estimated that 80% to 90% of Americans are economically disadvantaged under the SBA's net-worth requirements. See La Noue and Sullivan, "*Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*," 41 *Santa Clara Law Review*, p. 108.

[39] 42 U.S.C. §9802.

[40] P.L. 97-35, Omnibus Budget Reconciliation Act of 1981, Ch. 8, Subchapter A, 95 Stat. 489 (August 13, 1981) (codified at 42 U.S.C. §§9801 et seq.); and ibid. at §626, 95 Stat. 496 (codified at 42 U.S.C. §9815(a)(2)). ("Not later than 90 days after August 13, 1981, the Administrator of the Small Business Administration, after consultation with the Secretary, shall promulgate regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under §637(a) of title 15.")

[41] P.L. 99-272, Consolidated Omnibus Budget Reconciliation Act of 1985, §18015, 100 Stat. 370 (April 7, 1986) (codified at 15 U.S.C. §637(a)(13) and 15 U.S.C. §637(a)(4)).

[42] P.L. 102-415, Alaska Land Status Technical Corrections Act of 1992, §10, 106 Stat. 2115 (October 14, 1992) (codified at 43 U.S.C. §1626(e)).

[43] P.L. 100-656, Business Opportunity Development Reform Act of 1988, at §207, 102 Stat. 3861 (November 15, 1988) (codified at 15 U.S.C. §637(a)(4)).

> any community service organization serving Native Hawaiians in the State of Hawaii which (A) is a nonprofit corporation that has filed articles of incorporation with the director (or the designee thereof) of the Hawaii Department of Commerce and Consumer Affairs, or any successor agency, (B) is controlled by Native Hawaiians, and (C) whose business activities will principally benefit such Native Hawaiians.[44]

Program Requirements

Detailed statutory and regulatory requirements govern 8(a) Program eligibility, set-aside and sole-source awards, and related issues. These requirements are generally the same for all 8(a) firms, although there are instances where there are "special rules" for group-owned 8(a) firms.[45] An **Appendix** to this report compares the requirements applicable to individual owners of 8(a) firms to those applicable to groups owning 8(a) firms (i.e., ANCs, CDCs, NHOs, and Indian tribes).

General Requirements

Program Eligibility

As mentioned previously, 8(a) Program eligibility is limited to "small business[es] which [are] unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrates potential for success."[46] Each of these terms is defined by the Small Business Act; SBA regulations; and judicial and administrative decisions.[47] The eligibility requirements are the same at the time of entry into the program and throughout the program unless otherwise noted.[48]

Business

Except for small agricultural cooperatives, a *business* is a for-profit entity that has a place of business located in the United States and operates primarily within the United States or makes a significant contribution to the U.S. economy by paying taxes or using American products, materials, or labor.[49] For 8(a) Program purposes, businesses are individual proprietorships, partnerships, limited liability companies, corporations, joint ventures, associations, trusts, or cooperatives.[50]

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[44] Ibid. (codified at 15 U.S.C. §637(a)(15)). A Native Hawaiian is "any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii." 13 C.F.R. §124.3.

[45] 13 C.F.R. §124.109(a) ("*Special rules for ANCs*. Small business concerns owned and controlled by ANCs are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in §124.112 to the extent the criteria are not inconsistent with this section.") (emphasis in original).

[46] 13 C.F.R. §124.101. The Office of Legal Counsel at the Department of Justice has opined that SBA regulations limiting eligibility for the 8(a) Program to citizens do not deprive resident aliens of due process in violation of the Fifth Amendment to the U.S. Constitution. See U.S. Department of Justice, Office of Legal Counsel, Constitutionality of 13 C.F.R. §124.103 Establishing Citizenship Requirement for Participation in 8(a) Program, 20 Op. O.L.C. 85 (1996).

[47] The SBA's Office of Hearings and Appeals has, for example, developed a seven-part test for determining whether a small business is *unusually reliant* on a contractor that is used in determining affiliation. See Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996).

[48] 13 C.F.R. §124.112(a).

[49] 13 C.F.R. §121.105(a)(1). "Business" is separately defined for small agricultural cooperatives. See 13 C.F.R. §121.105(a)(2).

[50] 13 C.F.R. §121.105(b).

Small

A business is *small* if it is independently owned and operated; is not dominant in its field of operations; and meets any definitions or standards established by the SBA Administrator.[51] These standards focus primarily upon the size of the business as measured by the number of employees or average annual receipts (gross income for sole proprietorships), but they also take into account the size of other businesses within the same industry.[52] For example, businesses in the field of scheduled passenger air transportation are small if they have 1,500 or fewer employees, whereas those in the data processing field are small if they have average annual receipts of $32.5 million or less.[53]

Affiliations among businesses, or relationships allowing one party control or the power of control over another, generally count in size determinations, with the SBA considering "the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit."[54] Businesses can thus be determined to be other than small because of their involvement in joint ventures, subcontracting arrangements, or franchise or license agreements, among other things, provided that their income or personnel numbers, plus those of their affiliate(s), are over the pertinent size threshold.[55]

Unconditionally Owned and Controlled

8(a) firms must be "at least 51% unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States" unless they are owned by an ANC, CDC, NHO, or Indian tribe.[56] Ownership is *unconditional* when it is not subject to any conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements that could cause the benefits of ownership to go to another entity.[57] Ownership is *direct* when the disadvantaged individuals own the business in their own right and not through an intermediary (e.g., ownership by another business entity or by a trust that is owned and controlled by one or more disadvantaged individuals).[58] Non-disadvantaged individuals and nonparticipant businesses that own at least 10% of an 8(a) business may generally own no more than 10% to 20% of any other 8(a) firm.[59] Nonparticipant businesses that earn the majority of their revenue in the same or similar line of

[51] 15 U.S.C. §632(a)(1)-(2)(A).

[52] 13 C.F.R. §§121.101-121.109. The number of employees is the average number in each pay period for the preceding 12 calendar months. Receipts means *total income* (or in the case of a sole proprietorship, *gross income*) plus *cost of goods sold* as these terms are defined and reported on Internal Revenue Service tax return forms. Where possible, receipts are based on the average for the last three completed fiscal years. It includes all revenues, not just those from the firm's primary industry. See 13 C.F.R. §121.104.

[53] 13 C.F.R. §121.201.

[54] 13 C.F.R. §121.103(a)(6).

[55] 13 C.F.R. §121.103(h); 13 C.F.R. §121.103(h)(4); and 13 C.F.R. §121.103(i).

[56] 13 C.F.R. §124.105 (defining unconditional ownership). See also 15 U.S.C. §637(a)(4)(A)(i)-(ii) (requiring at least 51% unconditional ownership).

[57] 13 C.F.R. §124.3.

[58] 13 C.F.R. §124.105(a).

[59] 13 C.F.R. §124.105(h)(1). Ownership is limited to 10% when the 8(a) firm in is the *developmental stage* of the 8(a) Program and 20% when it is in the *transitional stage*. Ibid.

business are likewise barred from owning more than 10% (increasing to 20%-30% in certain circumstances) of another 8(a) firm.[60]

In addition, 8(a) firms must be controlled by one or more disadvantaged individuals.[61] "Control is not the same as ownership" and includes both strategic policy setting and day-to-day management and administration of business operations.[62] Management and daily business operations must be conducted by one or more disadvantaged individuals unless the 8(a) business is owned by an ANC, CDC, NHO, or Indian tribe.[63] These individuals must have managerial experience "of the extent and complexity needed to run the concern" and generally must devote themselves full-time to the business "during the normal working hours of firms in the same or similar line of business."[64] A disadvantaged individual must hold the highest officer position within the business.[65] Non-disadvantaged individuals may otherwise be involved in the management of an 8(a) business, or may be stockholders, partners, limited liability members, officers, or directors of an 8(a) business.[66] However, non-disadvantaged individuals may not exercise actual control or have the power to control the firm or its disadvantaged owner(s), or receive compensation greater than that of the highest-paid officer (usually the chief executive officer or president) without the SBA's approval.[67]

Socially Disadvantaged Individual

Socially disadvantaged individuals are "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."[68] Members of designated groups, listed in **Table 1**, are entitled to a rebuttable presumption of social disadvantage for 8(a) Program purposes, although this presumption can be overcome with "credible evidence to the contrary."[69] Individuals who are not designated-group members must prove they are socially disadvantaged by a preponderance of the evidence.[70] Such individuals must show (1) at least one objective distinguishing feature that has contributed to social disadvantage (e.g., race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from mainstream American society); (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impact on entry into or advancement in the business world.[71] In assessing the third factor, the SBA will consider all relevant evidence the applicant produces, but must consider the applicant's education, employment, and business history to see if the totality of

[60] 13 C.F.R. §124.105(h)(2).

[61] 15 U.S.C. §637(a)(4)(A)(i)-(ii) (requiring control of management and business operations); 13 C.F.R. §124.106.

[62] 13 C.F.R. §124.106.

[63] Ibid.

[64] 13 C.F.R. §124.106 & §124.106(a)(3).

[65] 13 C.F.R. §124.106(a)(2).The individual must also be physically located in the United States. Ibid.

[66] 13 C.F.R. §124.106(e).

[67] 13 C.F.R. §124.106(e)(1) & (3).

[68] 13 C.F.R. §124.103(a). See also 15 U.S.C. §637(a)(5).

[69] 13 C.F.R. §124.103(b)(3).

[70] 13 C.F.R. §124.103(c)(1).

[71] 13 C.F.R. §124.103(c)(2)(i)-(iii).

the circumstances shows disadvantage.[72] Groups not included in **Table 1** may obtain eligibility by demonstrating disadvantage by a preponderance of the evidence.[73]

Economically Disadvantaged Individual

Economically disadvantaged individuals are "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged."[74] Individuals claiming economic disadvantage must submit financial documentation for eligibility purposes.[75] The SBA will examine the individual's personal income for the past three years, their net worth, and the fair market value of their assets.[76] However, principal ownership in a prospective or current 8(a) business is generally excluded when calculating net worth, as is equity in individuals' primary residence.[77] For initial eligibility, applicants must have a net worth of less than $250,000.[78] For continued eligibility, net worth must be less than $750,000.[79]

Good Character

In determining whether an applicant to, or participant in, the 8(a) Program possesses *good character*, the SBA considers any criminal conduct, violations of SBA regulations, current debarment or suspension from government contracting, managers or key employees who lack business integrity, and the knowing submission of false information to the SBA.[80]

Demonstrated Potential for Success

For a firm to have demonstrated potential for success, it generally must have been in business in its primary industry classification for at least two full years immediately prior to the date of its application to the 8(a) Program.[81] However, the SBA may grant a waiver allowing firms that have been in business for less than two years to enter the program under specified circumstances.[82]

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[72] 13 C.F.R. §124.103(c)(2)(iii).

[73] 13 C.F.R. §124.103(d)(4). Groups petitioning for recognition as socially disadvantaged do not always obtain it. Over the years, the SBA has rejected petitions from Hasidic Jews, women, disabled veterans, and Iranian-Americans. See *supra* note 35.

[74] 13 C.F.R. §124.104(a). See also 15 U.S.C. §637(a)(6)(A).

[75] 13 C.F.R. §124.104(b)(1).

[76] 13 C.F.R. §124.104(c). See also 15 U.S.C. §637(a)(6)(E)(i)-(ii).

[77] 13 C.F.R. §124.104(c)(2).

[78] Ibid.

[79] Ibid.

[80] 13 C.F.R. §124.108(a)(1)-(5).

[81] 13 C.F.R. §124.107.

[82] A waiver to the two-year requirement may be granted when (1) the disadvantaged individual(s) upon whom eligibility is based have substantial business management experience; (2) the business has demonstrated the technical experience necessary to carry out its business plan with a substantial likelihood of success; (3) the firm has adequate capital to sustain its operations and carry out its business plan; (4) the firm has a record of successful performance on contracts in its primary field of operations; and (5) the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform 8(a) contracts. See 13 C.F.R. §124.107(b)(1)(i)-(v).

Set-Asides and Sole-Source Awards Under Section 8(a)

Section 8(a) of the Small Business Act authorizes agencies to award contracts for goods or services, or to perform construction work, to the SBA for subcontracting to 8(a) firms. The act also authorizes the SBA to delegate the function of executing contracts to the procuring agencies and often does so.[83]

A set-aside award is a contract awarded in which only certain contractors may compete, whereas a sole-source award is a contract awarded, or proposed for award, without competition.[84] The Competition in Contracting Act (CICA) generally requires federal agencies to allow full and open competition through the use of competitive procedures when procuring goods or services. However, set-aside and sole-source awards to 8(a) firms are permissible under CICA under certain circumstances. In fact, an 8(a) set-aside is a recognized competitive procedure.[85] Agencies are effectively encouraged to subcontract through the 8(a) Program because there are government-wide and agency-specific goals regarding the percentage of procurement dollars awarded to small disadvantaged businesses, which include 8(a) firms (the current government-wide goal is 5% of all small business eligible federal contracts).[86]

Discretion to Subcontract Through the 8(a) Program

There are few limits on agency discretion to subcontract through the 8(a) Program.[87] However, the SBA is prohibited by regulation from accepting procurements for award under Section 8(a) when

1. the procuring agency issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a set-aside for small businesses not participating in the program prior to offering the requirement to the SBA for award as an 8(a) contract;[88]
2. the procuring agency competed the requirement among 8(a) firms prior to offering the requirement to the SBA and receiving the SBA's acceptance of it;[89] or

[83] 13 C.F.R. §124.501(a); Partnership Agreement Between the U.S. Small Business Administration and the U.S. Department of Defense, January 7, 2013, at http://www.sba.gov/sites/default/files/files/Department%20of%20Defense.pdf.

[84] Set-asides may be total or partial. See 48 C.F.R. §19.501(a).

[85] 10 U.S.C. §2304(b)(2), 41 U.S.C. §3303(b) (the Competition in Contracting Act (CICA) provisions authorizing set-asides for small businesses); and 48 C.F.R. §§6.203-6.207 (set-asides for small business generally, 8(a) small businesses, Historically Underutilized Business Zone [HUBZone] small businesses, service-disabled veteran-owned small businesses, and women-owned small businesses). CICA authorizes competitions excluding all sources other than small businesses when such competitions assure that a "fair proportion of the total purchases and contracts for property and services for the Federal Government shall be placed with small business concerns." 41 U.S.C. §3104. CICA also permits sole-source awards when such awards are made pursuant to a procedure expressly authorized by statute, or when special circumstances exist (e.g., urgent and compelling circumstances). See 10 U.S.C. §2304(c)(1) (defense agency procurements) and 41 U.S.C. §§3301 and 3304(a) (civilian agency procurements).

[86] 13 C.F.R. §124.1002 (defining "small disadvantaged business").

[87] AHNTECH, Inc., B-401092 (April 22, 2009) ("The [Small Business] Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program.").

[88] Even in this situation, SBA may accept the requirement under "extraordinary circumstances." 13 C.F.R. §124.504(a); Madison Services, Inc., B-400615 (December 11, 2008) (finding that extraordinary circumstances existed when the agency's initial small business set-aside was erroneous and did not reflect its intentions).

[89] However, offers of requirements below the simplified acquisition threshold (generally $150,000) are assumed to

3. the SBA makes a written determination that "acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs."[90]

In addition, the SBA is barred from awarding an 8(a) contract, either via a set-aside or on a sole-source basis, "if the price of the contract results in a cost to the contracting agency which exceeds a fair market price."[91]

Otherwise, agency officials may offer contracts to the SBA "in [their] discretion," and the SBA may accept requirements for the 8(a) Program "whenever it determines such action is necessary or appropriate."[92] The courts and the Government Accountability Office (GAO) will generally not hear protests of agencies' determinations regarding whether to procure specific requirements through the 8(a) Program unless it can be shown that government officials acted in bad faith or contrary to federal law.[93]

Monetary Thresholds and Subcontracting Mechanisms

Once the SBA has accepted a contract for the 8(a) Program, the contract is awarded through either a set-aside or on a sole-source basis, with the contract amount generally determining the acquisition method used. When the contract's anticipated total value, including any options, is less than $4 million ($7 million for manufacturing contracts), the contract is normally awarded without competition.[94] In contrast, when the contract's anticipated value exceeds these thresholds, the contract generally must be awarded via a set-aside with competition limited to 8(a) firms so long as there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.[95] Sole-source awards of contracts valued at $4 million ($7 million or more for manufacturing contracts) may be made only when (1)

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have been accepted if SBA does not reply within two days. 13 C.F.R. §124.503(a)(4)(i). See also Eagle Collaborative Computing Services, Inc., B-401043.3 (January 28, 2011) (finding that an agency properly awarded a sole-source contract valued below the simplified acquisition threshold even though the SBA never formally accepted the requirements).

[90] 13 C.F.R. §124.504(a)-(c). The third provision applies only to preexisting requirements. It generally does not apply to new contracts, follow-on or renewal contracts, or procurements conducted using simplified acquisition procedures. Ibid. Also, under its regulations, the SBA must presume an adverse impact when "(A) The small business concern has performed the specific requirement for at least 24 months; (B) The small business is performing the requirement at the time it is offered to the 8(a) ... program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) ... program; and (C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates)." See 13 C.F.R. §124.504(c)(1)(i)(A)-(C).

[91] 15 U.S.C. §637(a)(1)(A); 48 C.F.R. §19.806(b). Fair market price is estimated by looking at recent prices for similar items or work, in the case of repeat purchases, or by considering commercial prices for similar products or services, available in-house cost estimates, cost or pricing data submitted by the contractor, or data from other government agencies, in the case of new purchases. 15 U.S.C. §637(a)(3)(B)(i)-(iii); 48 C.F.R. §19.807(b) & (c).

[92] 15 U.S.C. §637(a)(1)(A).

[93] See Rothe Computer Solutions, LLC, B-299452 (May 9, 2007).

[94] 15 U.S.C. §637(a)(16)(A). A noncompetitive award may be made under this authority so long as (1) the firm is determined to be a responsible contractor for performance of the contract; (2) the award of the contract would be consistent with the firm's business plan; and (3) award of the contract would not result in the firm exceeding the percentage of revenue from 8(a) sources forecast in its annual business plan. 15 U.S.C. §637(a)(16)(A)(i)-(iii).

[95] 15 U.S.C. §637(a)(1)(D)(ii); 48 C.F.R. §19.805-1(a). However, competitive awards for contracts whose anticipated value is less than $4 million ($7 million for manufacturing contracts) can be made with the approval of the SBA's Associate Administrator for 8(a) Business Development. 15 U.S.C. §637(a)(1)(D)(i)(I)-(II); 48 C.F.R. §19.805-1(d).

there is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price or (2) the SBA accepts the requirement on behalf of an 8(a) firm owned by an Indian tribe, an ANC or, in the case of Department of Defense contracts, an NHO.[96] Requirements valued at more than $4 million ($7 million for manufacturing contracts) cannot be divided into several acquisitions at lesser amounts in order to make sole-source awards.[97]

In addition, the Federal Acquisition Regulatory Council has the responsibility of adjusting each acquisition-related dollar threshold (including those for the 8(a) Program), on October 1, of each year that is evenly divisible by five.[98] The next adjustment for inflation will take place on October 1, 2020.

Other Requirements

Other key 8(a) Program requirements include the following:

- **Inability to protest an 8(a) firm's eligibility for an award.** When the SBA makes or proposes an award to an 8(a) firm, the firm's eligibility cannot be challenged or protested as part of the solicitation or proposed contract award. Instead, information concerning a firm's eligibility must be submitted to the SBA in accordance with separate requirements contained in Section 124.517 of Title 13 of the *Code of Federal Regulations*.[99]
- **Nine-year maximum participation.** Firms may participate in the program for no more than nine years from the date of their admission, although they may be terminated or graduate from the program before nine years have passed.[100]
- **One-time eligibility.** Once a firm or a disadvantaged individual upon whom a firm's eligibility was based has exited the program after participating in it for any length of time, neither the firm nor the individual is generally eligible to participate in the program again.[101] Firms are considered identical for purposes of program eligibility when at least 50% of the assets of one firm are the same as those of another firm.[102]
- **Ownership limitations on family members of current or former 8(a) firm owners.** Individuals generally may not use their disadvantaged status to qualify a

[96] 48 C.F.R. §19.805-1(b)(1)-(2) (sole-source awards to tribally or ANC-owned firms); and 48 C.F.R. §219.805-1(b)(2)(A)-(B) (sole-source awards to NHO-owned firms). Prior to enactment of P.L. 111-84, the National Defense Authorization Act (NDAA) for FY2010, contracting officers making sole-source awards in reliance on the second exception did not have to justify such awards or obtain approval of them from higher-level agency officials. The NDAA changed this by requiring justifications, approvals, and notices for sole-source contracts in excess of $20 million (now $22 million) awarded under the authority of §8(a) analogous to those required for sole-source contracts awarded under the general contracting authorities. Compare P.L. 111-84, §811, 123 Stat. 2405-06 (October 28, 2009) with 10 U.S.C. §2304(c) and (f) (procurements of defense agencies); and 41 U.S.C. §3304(a) and (e) (procurements of civilian agencies).

[97] 48 C.F.R. §19.805-1(c).

[98] 13 C.F.R. §124.506 (a); and 41 U.S.C. §1980.

[99] 48 C.F.R. §19.805-2(d).

[100] 15 U.S.C. §636(j)(15) (nine-year term); 15 U.S.C. §637(a)(9) (termination and early graduation); 13 C.F.R. §124.301 (exiting the program); 13 C.F.R. §124.302 (early graduation); and 13 C.F.R. §124.303 (termination).

[101] 15 U.S.C. §636(j)(11)(B)-(C); and 13 C.F.R. §124.108(b).

[102] 13 C.F.R. §124.108(b)(4).

firm for the program if the individual has an immediate family member who is using, or has used, the disadvantaged status to qualify a firm for the program.[103]

- **Award Limitations.** In general, 8(a) firms may not receive additional 8(a) sole-source awards once they have been awarded a combined total of competitive and sole-source awards in excess of $100 million, in the case of firms whose size is based on their number of employees, or in excess of an amount equivalent to the lesser of (1) $100 million or (2) five times the size standard for the industry, in the case of firms whose size is based on their revenues.[104] In addition, 8(a) firms in the *transitional stage*, or the last five years of participation, must achieve annual targets for the amount of revenues they receive from non-8(a) sources.[105] These targets increase over time, with firms required to attain 15% of their revenue from non-8(a) sources in the fifth year, 25% in the sixth year, 35% in the seventh year, 45% in the eight year, and 55% in the ninth year.[106] Firms that do not display the relevant percentages of revenue from non-8(a) sources are ineligible for sole-source 8(a) contracts "unless and until" they correct the situation.[107]
- **Subcontracting Limitations.** Federal subcontracting limitations require small businesses receiving contracts under set-asides to perform work that equals certain minimum percentages of the amount paid under the contract.[108] Specifically, small businesses must generally perform at least 50% of the costs of the contract incurred for personnel with its own employees, in the case of service contracts; and at least 50% of the cost of manufacturing supplies or products (excluding the cost of materials), in the case of manufacturing contracts.[109]

Requirements for Tribally, ANC-, NHO-, and CDC-Owned Firms

Tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs) or Community Development Corporations (CDCs) themselves generally do not participate in the 8(a) Program. Rather, businesses that are at least 51% owned by such entities participate in the

[103] 13 C.F.R. §124.105(g)(1). SBA may waive this prohibition if the firms have no connections in terms of ownership, control, or contractual relationships and certain other conditions are met. Ibid.

[104] 13 C.F.R. §124.519(a)(1)-(2). Contracts less than $100,000 are not counted in determining whether a firm has reached the applicable limit. 13 C.F.R. §124.519(a)(3). The SBA Administrator may waive this requirement if the procuring agency's head determines that a sole-source award to a firm is necessary "to achieve significant interests of the Government." 13 C.F.R. §124.519(e). Even after firms have received a combined total of competitive and sole-source awards in excess of $100 million, or other applicable amount, they may still receive competitive contracts under the 8(a) Program. 13 C.F.R. §124.519(b).

[105] 15 U.S.C. §636(j)(10)(I)(i)-(iii); 13 C.F.R. §124.509(b)(1).

[106] 13 C.F.R. §124.509(b)(2).

[107] 13 C.F.R. §124.509(d)(1). This prohibition may be waived if the Office of Business Development's director determines that denial of a sole-source contract would cause severe economic hardship for the firm, potentially jeopardizing its survival, or if extenuating circumstances beyond the firm's control caused it to miss its target. 13 C.F.R. §125.509(e).

[108] 15 U.S.C. §637(a)(14)(A)-(B); 15 U.S.C. §644(o); 13 C.F.R. §125.6; and 48 C.F.R. §52.219-14.

[109] 15 U.S.C. §657s(a)(1)&(2); and 13 C.F.R. §125.6(a)(1)-(2). There are separate provisions regarding the percentage of work to be performed under construction contracts. See generally 13 C.F.R. §125.6(a)(3)-(4).

program,[110] although the rules governing their participation are somewhat different from those for the program generally.[111]

Program Eligibility

Small

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be deemed small under the SBA's size standards.[112] However, certain affiliations with the owning entity or other business enterprises of that entity are excluded in size determinations *unless* the SBA Administrator determines that a small business owned by an ANC, CDC, NHO, or Indian tribe "[has] obtained, or [is] likely to obtain, a substantial unfair competitive advantage within an industry category" because of such exclusions.[113] Other affiliations of small businesses owned by ANCs, CDCs, NHOs, and Indian tribes may be included in size determinations, and ANC-owned firms, in particular, have been subjected to early graduation from the 8(a) Program because they exceeded size standards.[114]

Business

Firms owned by ANCs, CDCs, NHOs, and Indian tribes must be "businesses" under the SBA's definition.[115] Although ANCs themselves may be for-profit or nonprofit, ANC-owned businesses must be for-profit to participate in the program.[116]

Unconditionally Owned and Controlled

Firms owned by ANCs, CDCs, NHOs, or Indian tribes must be unconditionally owned and substantially controlled by the ANC, CDC, NHO, or Indian tribe, respectively.[117] However, under SBA regulations, tribally or ANC-owned firms may be managed by individuals who are not members of the tribe or Alaska Natives if the firm can demonstrate:

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[110] 13 C.F.R. §124.109(c)(3)(i) (tribally and ANC-owned firms); 13 C.F.R. §124.110 (b) (NHO-owned firms); and 13 C.F.R. §124.111(c) (CDC-owned firms).

[111] 13 C.F.R. §§124.109-124.111.

[112] 13 C.F.R. §124.109(c)(2) (tribally and ANC-owned firms); 13 C.F.R. §124.110(b) (NHO-owned firms); and 13 C.F.R. §124.111(c) (CDC-owned firms).

[113] 13 C.F.R. §124.109(c)(2)(iii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(b) (NHO-owned firms); and 13 C.F.R. §124.111(c) (CDC-owned firms).

[114] See Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996) (rejecting a challenge to the size of an ANC-owned firm because its subcontractor performed less than 25% of the work on the contract and was not its affiliate); and U.S. Government Accountability Office (GAO), *Increased Used of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight*, GAO-06-399, April 27, 2006, p. 29, at http://www.gao.gov/new.items/d06399.pdf (describing "early graduation" of ANC-owned 8(a) firms).

[115] 13 C.F.R. §124.109(a) and (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); and 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

[116] 13 C.F.R. §124.109(a)(3).

[117] 13 C.F.R. §124.109(a) and (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); and 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

> that the Tribe [or ANC] can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.[118]

NHO-owned firms must demonstrate that the NHO controls the board of directors.[119] However, the individual who is responsible for the NHO-owned firm's day-to-day management need not establish personal social and economic disadvantage.[120] CDCs are to be managed and have their daily operations conducted by individuals with "managerial experience of an extent and complexity needed to run the [firm]."[121]

Socially Disadvantaged

As owners of prospective or current 8(a) firms, Indian tribes, ANCs, NHOs, and CDCs are all presumed to be socially disadvantaged.[122]

Economically Disadvantaged

By statute, ANCs are deemed to be economically disadvantaged, and CDCs are similarly treated as economically disadvantaged.[123] In contrast, Indian tribes and NHOs must establish economic disadvantage. Indian tribes must present data on, among other things, the number of tribe members; the tribe members' unemployment rate and per capita income; the percentage of the local Indian population above the poverty level; the tribe's access to capital and assets as disclosed in current financial statements; and all businesses wholly or partially owned by tribal enterprises or affiliates, as well as their primary industry classification.[124] Effective August 24, 2016, NHOs establish economic disadvantage in the same manner as Indian tribes.[125] Prior to this revision, the SBA considered "the individual economic status of NHO's members," the majority

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[118] 13 C.F.R. §124.109(c)(4)(B).

[119] 13 C.F.R. §124.110(d).

[120] Ibid.

[121] 13 C.F.R. §124.111(b).

[122] 13 C.F.R. §124.109(b)(1) (tribally and ANC-owned firms); 15 U.S.C. §637(a)(4)(A)(i)(II) (NHO-owned firms); 13 C.F.R. §124.110(a) (same); 13 C.F.R. §124.111(a) (CDC-owned firms); and Small Disadvantaged Business Certification Application: Community Development Corporation (CDC) Owned Concern, OMB Approval No. 3245-0317 ("A Community Development Corporation (CDC) is considered to be a socially and economically disadvantaged entity if the parent CDC is a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, et seq."). The SBA's authority to designate CDCs as socially and economically disadvantaged derives from Section 9815(a)(2) of Title 42 of the *United States Code*, which required SBA to "promulgate regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under §637(a) of title 15."

[123] 43 U.S.C. §1626(e)(1) ("For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors."); 13 C.F.R. §124.109(a)(2) (similar); and 13 C.F.R. §124.111(a).

[124] 15 U.S.C. §637(a)(6)(A); and 13 C.F.R. §124.109(b)(2)(i)-(vii).

[125] SBA, "Small Business Mentor Protégé Program," 81 *Federal Register* 48571, July 25, 2016.

of whom had to qualify as economically disadvantaged, under the same standards as individual applicants to the program.[126]

Once a tribe or NHO has established that it is economically disadvantaged for purposes of one 8(a) business, it need not reestablish economic disadvantage in order to have other businesses certified for the program *unless* the Director of the Office of Business Development requires it to do so.[127]

Good Character

The SBA's regulations governing tribally and ANC-owned 8(a) firms explicitly state that the good character requirement applies only to officers or directors of the firm, or shareholders owning more than a 20% interest.[128] NHO-owned firms may be subject to the same requirements in practice.[129] With CDC-owned firms, the firm itself and "all of its principals" must have good character.[130]

Demonstrated Potential for Success

Firms owned by ANCs, CDCs, NHOs, and Indian tribes may provide evidence of *potential for success* in several ways:

1. The firm has been in business for at least two years, as shown by individual or consolidated income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the firm seeks certification.
2. The individuals who will manage and control the firm's daily operations have substantial technical and management experience; the firm has a record of successful performance on government or other contracts in its primary industry category; and the firm has adequate capital to sustain its operations and carry out its business plan.
3. The owner-group has made a firm written commitment to support the firm's operations and has the financial ability to do so.[131]

The first of these ways for demonstrating potential for success is the same for individually owned firms, and the second arguably corresponds to the circumstances in which the SBA may waive the requirement that individually owned firms have been in business for at least two years.[132] There is no equivalent to the third way for individually owned firms, and some commentators have suggested that this provision could "benefit ANCs [and other owner groups] by allowing more

[126] 13 C.F.R. §124.110(c)(1). Specifically, for the first 8(a) applicant owned by a particular NHO, individual NHO members had to meet the same initial eligibility economic disadvantage thresholds as individually-owned 8(a) applicants. For any additional 8(a) applicant owned by the NHO, individual NHO members had to meet the economic disadvantage thresholds for continued 8(a) eligibility. If the NHO had no members, then a majority of the members of the board of directors had to qualify as economically disadvantaged. Ibid.

[127] 13 C.F.R. §124.109(b).

[128] 13 C.F.R. §124.109(c)(7)(ii).

[129] The regulations as to NHOs do not appear to address "good character." However, in practice, when this has happened in the past, NHO-owned firms have often been treated the same as firms owned by Indian tribes.

[130] 13 C.F.R. §124.111(g).

[131] 13 C.F.R. §124.109(c)(6)(i)-(iii) (ANC- and tribally-owned firms); 13 C.F.R. §124.110(g)(1)-(3) (NHO-owned firms); and 13 C.F.R. §124.111(f)(1)-(3) (CDC-owned firms).

[132] 13 C.F.R. §124.107; and 13 C.F.R. §124.107(b)(1)(i)-(v).

expeditious and effortless access to 8(a) contracts for new concerns without having to staff new subsidiaries with experienced management."[133]

Report of Benefits for Firms Owned By ANCs, Indian Tribes, NHOs, and CDCs

8(a) firms owned by ANCs, CDCs, NHOs, and Indian tribes must submit information with its annual financial statement to the SBA showing

> how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) … program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO or CDC to the affected community.[134]

Set-Asides and Sole-Source Awards

Similar to other participants, firms owned by ANCs, CDCs, NHOs, and Indian tribes are eligible for 8(a) set-asides and may receive sole-source awards valued at less than $4 million ($7 million for manufacturing contracts). However, firms owned by ANCs and Indian tribes can also receive sole-source awards in excess of $4 million ($7 million for manufacturing contracts) even when contracting officers reasonably expect that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.[135] NHO-owned firms may receive sole-source awards from the Department of Defense under the same conditions.[136]

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[133] Daniel K. Oakes, "Inching Toward Balance: Reaching Proper Reform of the Alaska Native Corporations' 8(a) Contracting Preferences," 40 *Public Contract Law Journal* 777 (2011).

[134] 13 C.F.R. §124.604. SBA regulations promulgated in February 2011 provided that this reporting requirement would be effective "as of September 9, 2011, unless SBA further delays implementation through a Notice in the Federal Register." SBA, "Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations: Final Rule," 76 *Federal Register* 8222-8264 (February 11, 2011). The SBA subsequently delayed the reporting requirement through at least five such notices. See SBA, "8(a) Business Development Program Regulations; Tribal Consultations," 76 *Federal Register* 12273, 12274 (March 7, 2011); SBA, "8(a) Business Development Program Regulations; Tribal Consultations," 76 *Federal Register* 27859, 27860 (May 13, 2011); SBA, "Data Collection Available for Public Comments and Recommendations: 60 Day Notice and Request for Comments," 76 *Federal Register* 63983, 63984 (October 14, 2011); SBA, "Data Collection Available for Public Comments and Recommendations: 60 Day Notice and Request for Comments," 77 *Federal Register* 73509, 73510 (December 10, 2012); and SBA, "Data Collection Available for Public Comments and Recommendations; Notice: Extension of Comment Period for New 8(a) Business Development Program Reporting Requirements," 78 *Federal Register* 9447 (February 8, 2013). GAO reports that until 2016 compliance with this reporting requirement varied because the SBA did not have an OMB-approved standard form to collect the data. In 2011, the SBA developed a seven page form, but after receiving comments that the form was too burdensome it was not adopted. After consultations with OMB, ANCs, and other groups, in June 2015, the SBA proposed a new one-page form. OMB approved the form on March 3, 2016. See SBA, "Data Collection Available for Public Comments: 60 Day Notice and Request for Comments," 80 *Federal Register* 31444, 31445 (June 2, 2015); SBA, "Reporting and Recordkeeping Requirements Under OMB Review: 30 Day Notice," 80 *Federal Register* 73035, 73036 (November 23, 2015); and GAO, *Alaska Native Corporations: Oversight Weaknesses Continue to Limit SBA's Ability to Monitor Compliance with 8(a) Program Requirements*, GAO-16-113, March 21, 2016, p. 36, at http://www.gao.gov/assets/680/675905.pdf.

[135] P.L. 100-656, §602(a), 102 Stat. 3887-88 (November 15, 1988) (codified at 15 U.S.C. §637 note); and 48 C.F.R. §19.805-1(b)(2).

[136] DOD's authority to make sole-source awards to NHO-owned firms of contracts valued at more than $4 million ($7 million for manufacturing contracts) even if contracting officers reasonably expect that offers will be received from at least two responsible small businesses existed on a temporary basis in 2004-2006 and became permanent in 2006. See P.L. 109-148, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, §8020, 119 Stat. 2702-03 (December 30, 2005) ("[Provided] [t]hat,

Other Requirements

Firms owned by ANCs, CDCs, NHOs, and Indian tribes are governed by the same regulations as other 8(a) firms in which certain of the "other requirements" are involved, including (1) inability to protest an 8(a) firm's eligibility for an award;[137] (2) maximum of nine years in the program (for individual firms);[138] and (3) limits on subcontracting.[139] However, requirements for such firms differ somewhat from those for other 8(a) firms, including the one-time eligibility for the 8(a) Program; limits on majority ownership of 8(a) firms; and limits on the amount of 8(a) contracts that a firm may receive. Firms owned by ANCs, CDCs, NHOs, and Indian tribes may participate in the 8(a) Program only one time.[140] However, unlike the disadvantaged individuals upon whom other firms' eligibility for the 8(a) Program is based, ANCs, CDCs, NHOs, and Indian tribes may confer program eligibility upon firms on multiple occasions and for an indefinite period.[141] In addition, ANCs, CDCs, NHOs, and Indian tribes may not own 51% or more of another firm that "either at the time of application or within the previous two years," obtains the majority of its revenue from the same "primary" industry as the applicant. However, there are no limits on the number of firms they may own that operate in other primary industries.[142] Moreover, ANCs, CDCs, NHOs, and Indian tribes may own multiple firms that earn less than 50% of their revenue in the same "secondary" industries.[143] Finally, firms owned by ANCs, CDCs, NHOs, and Indian tribes may continue to receive additional sole-source awards even after they have received a combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in Section 124.519 of Title 13 of the *Code of Federal Regulations*. Individually owned firms may not exceed this threshold.[144] However, firms owned by any of these four types of entities are subject to the same requirements regarding the percentages of revenue received from non-8(a) sources at various stages of their participation in the program as other 8(a) firms.[145]

during the current fiscal year and hereafter, businesses certified as 8(a) by the Small Business Administration pursuant to section 8(a)(15) of Public Law 85-536, as amended, shall have the same status as other program participants under section 602 of P.L. 100-656 ... for purposes of contracting with agencies of the Department of Defense."); 48 C.F.R. §219.805-1(b)(2)(A)-(B).

[137] 48 C.F.R. §19.805-2(d).

[138] 13 C.F.R. §124.109(a) & (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); and 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

[139] 15 U.S.C. §644(o); 15 U.S.C. §657s; 13 C.F.R. §125.6; and 48 C.F.R. §52.219-14.

[140] 13 C.F.R. §124.109(a) & (b) (ANC- and tribally-owned firms); 13 C.F.R. §124.110(a) (NHO-owned firms); and 13 C.F.R. §124.111(a) (CDC-owned firms).

[141] Ibid.; 15 U.S.C. §636(j)(11)(B)-(C).

[142] 13 C.F.R. §124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(e) (NHO-owned firms); and 13 C.F.R. §124.111(d) (CDC-owned firms). These regulations also provide that an 8(a) firm owned by an ANC, CDC, NHO, or Indian tribe may not, within its first two years in the 8(a) Program, receive a sole-source contract that is a follow-on to an 8(a) contract currently performed by an 8(a) firm owned by that entity, or previously performed by an 8(a) firm owned by that entity that left the program within the past two years. Ibid. In addition, there are restrictions on the percentage of work that may be performed by any non-8(a) venturer(s) in joint ventures involving 8(a) firms. See generally 13 C.F.R. §124.513.

[143] 13 C.F.R. §124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(e) (NHO-owned firms); 13 C.F.R. §124.111(d) (CDC-owned firms).

[144] 13 C.F.R. §124.519(a).

[145] 13 C.F.R. §124.509.

Organizational Structure

The SBA's Office of Business Development (BD), housed within the Office of Government Contracts and Business Development, oversees the 8(a) Program. BD has three offices: the Office of Certification and Eligibility (OCE), the Office of Management and Technical Assistance (OMTA); and the Office of Program Review (OPR). Their functions are provided in the footnote below.[146]

Applications for the 8(a) Program are processed at one of two central office duty stations (CODS), one located in San Francisco, CA, and the other in Philadelphia, PA.[147] Applicants apply to the CODS that serve the territory where the applicant's principal place of business is located. Business Opportunity Specialists (BOSs) work directly with 8(a) firms in district offices under the general supervision of the SBA's Office of Field Operations (OFO). Although BOSs report to the SBA's OFO, they interact extensively with BD, which is located in the SBA's headquarters building in Washington, DC. As will be discussed, GAO and others have argued that this overlapping organizational structure may "create programmatic challenges."[148]

[146] The Office of Certification and Eligibility (OCE) provides program participants recommendations concerning initial and continuing program eligibility. OCE's functions include, but are not limited to, analyzing and processing: (1) applications for initial program participation, (2) requests for reconsideration of decisions declining initial program applications; (3) requests to graduate early or to terminate, voluntarily withdraw, or suspend program participation; (4) changes of ownership, business structure, business name, and/or management; (5) annual continuing eligibility review issues; and (6) general questions concerning eligibility and application processes. OCE also provides technical assistance and support to SBA district offices (DOs) regarding outreach to potential program participants, eligibility issues, and waivers for outside employment.

The Office of Management and Technical Assistance (OMTA) administers most of the services that are not provided by DOs and reviews certain actions recommended by DOs. These services include (1) servicing sole-source, competitive, and multiple-award contracts; (2) analyzing and processing termination waivers, requests for competition below the competitive thresholds, requests for sole source above the thresholds, requests for waivers of sole source prohibition, bona fide office determinations, and mentor/protégé applications and reconsiderations; (3) subcontracting assistance; (4) overseeing and coordinating 7(j) technical and management training assistance; (5) overseeing and executing national and local seminars, conferences, and other similar activities; (6) outreach to prime contractors, federal agencies, and the 8(a) program community; (7) reciprocating with other certification entities; and (8) promoting, training, and assisting the DOs with their overall program objectives and initiatives.

The Office of Program Review (OPR) supports both 8(a) headquarters and field office staff by (1) evaluating and responding to external program reviews that may be conducted by the SBA's Office of Inspector General (OIG), Office of Government Contracting (for agency surveillance reviews), Office of Field Operations (for SBA DO reviews), and the U.S. Government Accountability Office (GAO); (2) responding to agency controlled correspondence from the public and congressional offices, Freedom of Information Act requests from the public, and clearance requests from other SBA offices; (3) gaining approval of agency partnership agreements and providing training for buying activities; (4) creating marketing products and updating the 8(a) program web page; (5) managing all activities associated with the surplus property program; (6) maintaining program data on firm participation; and (7) preparing the annual report to Congress on program participation and contracting.

See SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, pp. 29-31, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

[147] The San Francisco, California CODS screens and processes all applications submitted by Alaska Native Corporations (ANCs), regardless of where the concern is located.

[148] GAO, *Small Business Administration: Leadership Attention Needed to Overcome Management Challenges*, GAO-15-347, September 22, 2015, p. 59, at http://www.gao.gov/assets/680/672648.pdf.

The Application Process

Prior to applying for certification, firms must complete all requirements for contracting with the federal government (e.g., get a free D-U-N-S number—a unique nine-digit identification number of each physical business location from Dun and Bradstreet; obtain a free tax identification number or employer identification number from the Internal Revenue Service; create a profile in the federal System for Award Management, and get a free SBA general login system user ID).[149]

The SBA's district office staff generally encourage potential 8(a) Program applicants "to attend an information session to obtain information regarding the program and its eligibility criteria prior to filing an application … [and] also refer the applicant to SBA's website for forms, specific eligibility criteria, pertinent regulatory sections in the Code of Federal Regulations, and overall information on the program."[150]

In an attempt to encourage more applicants, the SBA revised and streamlined the 8(a) Program's application process in 2016 by accepting online applications only (hard copy applications are no longer accepted) and eliminating the requirement for a wet signature application; a completed IRS Form 4506T, Request for Copy or Transcript of Tax Form, in every case; and narrative statements in support of the applicants' claims of economic disadvantage. That determination is now based solely on an analysis of objective financial data relating to the individual's net worth, income and total assets.[151] In addition, to prevent what it viewed as unnecessary delays for minor infractions that may have "occurred many years ago" and may have "nothing to do with the individual's business integrity," the SBA made optional the automatic suspension of consideration and referral to the SBA OIG of all applications with adverse information regarding the applicant's or any of its principals' possible criminal conduct.[152]

Despite these changes, applicants still have a relatively long list of supporting documents (and required SBA Forms)[153] that they must submit, including the following:

- Signed and dated federal income tax returns for the firm and all individuals that either own more than 10% of the firm or have a key position in the firm for the past three years preceding the date of application (including all forms, statements, schedules and attachments).
- The firm's financial statements, balance sheet, and profit and loss statements for the past three years (including the most recent balance sheet, current within 90 days of application).
- A completed personal financial statement form (from all principals and their spouses), including a list of all assets, liabilities, real estate and other personal

[149] SBA, "Steps to Applying to the 8(a) Program," at https://www.sba.gov/contracting/government-contracting-programs/8a-business-development-program/how-apply. D-U-N-S is the data universal number system that businesses are required to register with the federal government when competing for contracts or grants.

[150] SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 35, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

[151] SBA, "Small Business Mentor Protégé Program," 81 *Federal Register* 48569, July 25, 2016.

[152] Ibid., p. 48570.

[153] Firms must submit SBA Form 1010, 8(a) Business Development (BD) Program Application along with supporting documentation. Individuals must submit SBA Form 1010-IND, Individual Information; SBA Form 912, Statement of Personal History; any individual who responds 'Yes' to questions 7, 8 or 9 on the SBA Form 912 must submit a completed SBA Fingerprint Card (FD 258, Fingerprint Card); and SBA Form 413, Personal Financial Statement. See SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, pp. 37-39, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

property, including transferred assets, information on delinquent federal obligations, past due taxes or liens, bankruptcy filings and pending civil lawsuits, and a list of any SBA loans for the firm and other businesses owned by the principal(s).

- A list or chart of the firm's current and past federal and nonfederal contracts within the most recently completed fiscal year.
- A list of any lease agreements.
- Proof of signature authority on the firm's bank account(s) (i.e., signature card(s) for firm bank account(s) or letter from the bank).
- Documented proof of contributions: (1) used to acquire ownership (for each owner), (2) of any transfer of assets to or from the firm, and (3) of any transfer of assets to or from any of the firm's owners over the past two years.
- State filings (signed, dated and stamped by the state where the firm does business) and certificate of good standing.[154]
- List of any foreign corporation filings.
- Articles of incorporation, articles of organization, any DBA ("doing business as") filings, governing documents signed by the principals, bylaws, operating agreements, partnership agreements, and meeting minutes.
- Any stock certificates and ledgers.
- Proof of social disadvantage from majority owners and firm managers.
- Background information and personal information from all principals, including a resume, a completed Statement of Personal History form, proof of U.S. citizenship or naturalization, duties within the firm and time devotion, a list of other business interests and time devotion, and the nature of outside employment and time devotion.[155]
- Documentation addressing how the firm meets specified objectives, if it is applying for a two-year waiver.[156]

As mentioned previously, applications are processed at the San Francisco or Philadelphia CODS. In general, the SBA processes an application and issues a decision letter within 90 days of the receipt of an application package. The processing time will be suspended only if an applicant is referred to the SBA OIG, for a formal size determination, or both.[157]

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[154] A certificate of good standing is issued by the Secretary of State's Office evidencing that a business has complied with the applicable provisions of the laws of the state, is in good standing, and authorized to transact business or to conduct affairs within the state.

[155] Principals include owner(s) of more than 10%, officers, directors, members, partners, and key employees.

[156] The specified objectives are "substantial demonstration of business management experience; demonstrated technical expertise to carry out its business plan; adequate capital; record of successful performance on contracts (including copies of contracts that will reflect the different sizes the firm can handle); and ability to obtain the personnel, facilities, equipment, and any other requirements to perform on contracts. Applicants seeking this waiver must also provide a list of the different services/products provided by the firm; billing invoices and bank statements reflecting deposit of receipts; and letters of reference from the firm's clients." See SBA, "8(a) Application Checklist," at https://sbaone.atlassian.net/wiki/spaces/CKB/pages/96370728/8+a+Initial+Application+Document+Checklist.

[157] SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 73, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf; and 13 C.F.R. §124.204(a).

Applicants are notified within 15 days of receipt whether the application package is complete or incomplete. The SBA will not process an incomplete application.[158] *Complete* means that the application is ready to be processed.

A BOS, at one of the CODS, initially reviews the application. If, during the eligibility review process, it is determined that an application is incomplete, the BOS may request additional information or clarification "via a delivery method that tracks delivery and provides return receipt capability."[159] The applicant must provide the requested information within five calendar days of receipt of the request. Failure to meet the deadline may result in the applicant's ineligibility to participate in the program. However, a request for additional information does not stop the 90-day processing clock. "Once the requested information is provided, the case may require priority handling in order for the CODS to complete the eligibility review within the required timeframe."[160]

After the initial review, the BOS submits the case file, the BOS analysis, and a decision letter to the CODS' chief for review. The chief examines the BOS analysis and decision letter to verify that all required steps and regulations have been properly applied. Upon completing the examination, the chief returns the case file and attachments to the BOS along with any applicable comments and recommendations.[161]

The BOS then makes any changes or corrections to the analysis or decision letter as requested by the chief. The chief then signs and returns the case file to the processing BOS. The chief makes his or her recommendation in the electronic application system (which is equivalent to transmitting it to the OCE's director, who approves or declines the application largely based on the CODS' review).[162]

After the OCE review, the associate administrator for Business Development (AA/BD) ultimately approves or declines the application in writing.[163] The electronic application system notifies the firm by issuing an approval or declination letter. All declination letters must clearly explain the reason(s) why the firm was found to be ineligible, including a direct reference to regulatory provisions that the applicant failed to satisfy. The letter must also include the applicant's right to request reconsideration and, if applicable, to appeal the decision to the SBA's Office of Hearings and Appeals.[164]

As discussed below in the "Current Issues" section, the SBA and others have identified the application process, and its relatively high rate of rejection, as an impediment to the 8(a) Program's growth.

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[158] 13 C.F.R. §124.204(a).

[159] SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 73, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

[160] Ibid.

[161] Ibid., p. 75.

[162] Ibid.

[163] 13 C.F.R. §124.204(f).

[164] SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 74, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf; SBA, Office of Inspector General, "SBA's 8(a) Business Development Program Eligibility," Audit Report, Number 16-13, April 7, 2016, p. 2, at https://www.sba.gov/sites/default/files/oig/16-13_SBAs_8a_Business_Development_Program_Eligibility.pdf; 13 C.F.R. §124.205; and 13 C.F.R. §124.206.

Business Opportunity Specialists and Reporting Requirements

BOSs assist both prospective and existing 8(a) firms with questions related to the application process, required forms, and the program's various eligibility, reporting, and performance requirements. BOSs also provide general business development assistance, assist with the firm's planning and establishment of goals, work with the firm as it develops and submits its required business plan, and ensure that the firm is on track regarding anticipated business growth.[165] BOSs "on-going responsibility is to assist the Participant in developing its business to the fullest extent possible so that it attains competitive viability during its program participation term, and maintains viability thereafter."[166] As directed, BOSs accomplish this by (1) helping the firm identify its strengths and weaknesses; (2) providing advice, counsel, and guidance in the areas of marketing to the federal government, prime contracting, and contract administration; (3) referring the firm to appropriate internal and external resources for assistance in technical, management, and financial matters; and (4) monitoring the firm's progress in the program and its compliance with program requirements.[167]

8(a) firms must demonstrate program compliance by reporting specific information to the SBA on an as needed, periodic, or requested basis. Much of the reporting is accomplished through the required annual review, which focuses on the firm and its business development, and the continuing eligibility review.[168]

The annual review requires numerous forms and documentation, including the following:

- Form 1450—8(a) Annual Update Review (information about the firm, including its tenure in the program, current financial data, business development targets, loans and other sources of capital, and applicable bonding information);
- Form 1623—Certification Regarding Debarment, Suspension, and Other Responsibility Matters Primary Covered Transactions (detailed information regarding any debarments, suspensions, or other potentially adverse matters);
- Form 1790—Representatives Used and Compensation Paid for Services in Connection with Obtaining Federal Contracts (required semiannually, includes a list of any agents, representatives, accountants, consultants, etc. that receive fees,

[165] SBA, Office of Government Contracting and Business Development, "Supplemental Workbook, May 2013, Module 3 Winning Contracts Pre-8(a) Business Development Program Training Series," at https://www.sba.gov/sites/default/files/8abd_module3_workbook.pdf.

[166] SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, pp. 131, 132, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

[167] Ibid., p. 132.

[168] SBA, Office of Government Contracting and Business Development, "Pre-8(a) Business Development Program Module 4—Business Planning and Operational Management, transcript," February 2015, p. 9, at https://www.sba.gov/sites/default/files/Pre8a_module4_transcript.pdf; and SBA, Office of Business Development, Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 212, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf. …Continuing eligibility reviews are conducted by the District Office and OCE. …OCE conducts continuing eligibility review on 8(a) Participant firms that are considered high risk/complex and those that are requested from the field staff. See SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 212, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

commissions, or compensation of any kind to assist the firm in obtaining or seeking federal contracts);

- Form 912—Statement of Personal History (information related to claiming disadvantaged status for all officers, directors, general partners, managing members, and holders of more than 10% ownership in the firm); and
- Form 413—Personal Financial Statement (information concerning the owner's and their spouse's personal net worth).[169]

8(a) firms are also required to provide any updates or modifications to their business plan.[170] If the firm participates in the 8(a) Mentor-Protégé Program (see below) it must provide "a narrative report detailing the contracts it has had with its mentor and benefits it has received from the mentor/protégé relationship."[171] In addition, the firm must provide a report for each 8(a) contract performed during the year "explaining how the performance of work requirements are being met for the contract, including any 8(a) contracts performed as a joint venture."[172]

In 2010, GAO reported that the district staff's "dual role of advocacy for and monitoring of the firms may have contributed in part to the retention of ineligible firms."[173] In response, in 2012, the SBA shifted responsibility for processing the continued eligibility portion of the required annual review from BOSs located in the SBA district offices to its Washington, DC, office. While BOSs continue to perform other components of the annual review, "shifting the responsibility for processing continued eligibility to headquarters was designed to eliminate conflict of interest for district offices associated with performing both assistance and oversight roles."[174]

8(a) firms may leave the program by any of the following means:

- voluntary withdrawal;
- voluntary early graduation (where the firm voluntarily decides to leave the program after the SBA has determined that the firm has substantially achieved its business plan's targets, objectives, and goals and has demonstrated the ability to compete in the marketplace without program assistance);
- involuntary early graduation (where the SBA requires a firm to leave the program because it has determined that the firm has substantially achieved its business plan's targets, objectives, and goals and has demonstrated the ability to compete

[169] SBA, Office of Government Contracting and Business Development, "Pre-8(a) Business Development Program Module 4—Business Planning and Operational Management, transcript," February 2015, pp. 9, 10, at https://www.sba.gov/sites/default/files/Pre8a_module4_transcript.pdf.

[170] Ibid., p. 10.

[171] 13 C.F.R. §124.112(b)(6).

[172] 13 C.F.R. §124.112(b)(8).

[173] GAO, *Small Business Administration: Steps Have Been Taken to Improve Administration of the 8(a) Program, but Key Controls for Continued Eligibility Need Strengthening*, GAO-10-353, March 30, 2010, pp. 9, 10, 26, at http://www.gao.gov/assets/310/302582.pdf.

[174] GAO, *Small Business Administration: Leadership Attention Needed to Overcome Management Challenges*, GAO-15-347, September 22, 2015, p. 63, at http://www.gao.gov/assets/680/672648.pdf. …a. Upon completion of the analysis, the District Office BOS will forward the completed annual review to the District Director through the Assistant District Director for final disposition; b. After the review of the District Office BOS recommendation, the District Director must then enter his/her recommendation in the 8(a) electronic tracking system to complete the Annual Review reporting. …The District Office will send a letter to the 8(a) Participant notifying the firm that their annual review is complete and that the Participant continues to be eligible to participate in the 8(a) BD Program. See SBA, Office of Business Development, Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 200, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

in the marketplace without program assistance; or one or more of the disadvantaged owners upon whom the firm's eligibility is based are no longer economically disadvantaged);[175]

- termination for good cause;[176]
- expiration of the program term (maximum of nine years) without meeting the SBA's graduation requirements;[177] or
- graduation at the expiration of the program term.

7(j) Management and Technical Assistance Program

The SBA's 7(j) Management and Technical Assistance Program assists 8(a) firms by providing management and technical assistance training. The program's origin dates back to 1970 when the SBA issued regulations creating the 8(a) contracting program to "assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place."[178] Using its statutory authority under Section 7(j) of the Small Business Act to provide management and technical assistance through contracts, grants, and cooperative agreements to qualified service providers, the regulations specified that "the SBA may provide technical and management assistance to assist in the performance of the subcontracts."[179]

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[175] 13 C.F. R. §124.302. "In determining whether a Participant has substantially achieved the targets, objectives and goals of its business plan and in assessing the overall competitive strength and viability of a Participant, SBA considers the totality of circumstances, including the following factors: (1) Degree of sustained profitability; (2) Sales trends, including improved ratio of non-8(a) sales to 8(a) sales since program entry; (3) Business net worth, financial ratios, working capital, capitalization, and access to credit and capital; (4) Current ability to obtain bonding; (5) A comparison of the Participant's business and financial profiles with profiles of non-8(a) BD businesses having the same primary four-digit SIC code as the Participant; (6) Strength of management experience, capability, and expertise; and (7) Ability to operate successfully without 8(a) contracts." See 13 C.F. R. §124.302(b).

[176] Examples of termination for good cause include submission of false information in the firm's application materials; failure to maintain eligibility for program participation; failure, for any reason, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals; failure to obtain prior written approval from the SBA for any changes in ownership or business structure, management or control; failure to disclose the extent to which non-disadvantaged persons or firms participate in the firm's management; failure by the concern or one or more of the concern's principals to maintain good character; failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by the SBA's Office of Inspector General, or other requested information or data within 30 days of the request; cessation of business operations; failure to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability; a pattern of inadequate performance of awarded Section 8(a) contracts; failure to pay or repay significant financial obligations owed to the federal government; failure to obtain and keep current any and all required permits, licenses, and charters needed to operate the business; excessive withdrawals that are detrimental to the achievement of the targets, objectives, and goals contained in the participant's business plan; unauthorized use of SBA direct or guaranteed loan proceeds or violation of an SBA loan agreement; submission by or on behalf of a participant of false information to the SBA; debarment, suspension, voluntary exclusion, or ineligibility of the concern or its principals pursuant to 2 C.F.R. parts 180 and 2700 or FAR subpart 9.4 (48 C.F.R. part 9, subpart 9.4); conduct by the concern, or any of its principals, indicating a lack of business integrity; willful failure to comply with applicable labor standards and obligations; material breach of any terms and conditions of the 8(a) participation agreement; willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues. See 13 C.F.R. 124.303(a)(1-20) and (b).

[177] 13 C.F. R. §124.2.

[178] 13 C.F.R. §124.8-1(b) (1970); and Notes, "Minority Enterprise, Federal Contracting, and the SBA's 8(a) Program: A New Approach to an Old Problem," *Michigan Law Review*, vol. 71, no. 2 (December 1972), pp. 377, 378.

[179] 13 C.F.R. §124.8-1(d) (1970).

On October 24, 1978, P.L. 95-507, To amend the Small Business Act and the Small Business Investment Act of 1958, provided the SBA explicit statutory authority to extend financial, management, technical, and other services to socially and economically disadvantaged small businesses. The SBA's current regulations indicate that the 7(j) Management and Technical Assistance Program will, "through its private sector service providers [deliver] a wide variety of management and technical assistance to eligible individuals or concerns to meet their specific needs, including: (a) counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns; and (b) the identification and development of new business opportunities."[180] Eligible individuals and businesses include "8(a) certified firms, small disadvantaged businesses, businesses operating in areas of high unemployment or low income, or small businesses owned by low income individuals."[181]

As shown in **Table 2**, 4,100 small businesses received 7(j) program assistance in FY2017. The SBA has been marketing the 7(j) program to 8(a) firms in an effort increase awareness of the program, to help those small businesses "better prepare themselves for federal contracting opportunities," and to retain 8(a) firms in the 8(a) program.[182]

Table 2 also shows the amount of total administrative resources the SBA provides the 7(j) program each year.

Table 2. 7(j) Management and Technical Assistance Program Statistics, FY2010-FY2017

Fiscal Year	Number of Small Businesses Assisted	Actual Total Administrative Resources (Program Cost; $ in millions)
2017	4,100	$3.081
2016	5,245	$2.422
2015	5,360	$4.444
2014	4,104	$5.614
2013	3,913	$5.793
2012	3,272	$5.356
2011	3,550	$6.502
2010	3,480	$5.478

Source: U.S. Small Business Administration, "FY2017 Congressional Budget Justification and FY2015 Annual Performance Report," p. 101, at https://www.sba.gov/sites/default/files/FY17-CBJ_FY15-APR.pdf (number assisted and program cost); and U.S. Small Business Administration, "FY2019 Congressional Budget Justification and FY2017 Annual Performance Report," pp. 73, 74, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_19_508Final5_1.pdf.

Note: The 7(j) program is funded through a combination of directed appropriations, typically in the language accompanying annual appropriations measures, and the SBA's salaries and expenses (operating) budget account.

[180] 13 C.F.R. §124.702.

[181] SBA, "FY2017 Congressional Budget Justification and FY2015 Annual Performance Report," p. 50, at https://www.sba.gov/sites/default/files/FY17-CBJ_FY15-APR.pdf, and SBA, "FY2019 Congressional Budget Justification and FY2017 Annual Performance Report," pp. 73, 74, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_19_508Final5_1.pdf.

[182] SBA, "FY2017 Congressional Budget Justification and FY2015 Annual Performance Report," p. 50, at https://www.sba.gov/sites/default/files/FY17-CBJ_FY15-APR.pdf.

8(a) Mentor-Protégé Program[183]

The SBA established the 8(a) Mentor-Protégé Program on July 30, 1998.[184] The program is designed to "enhance the capabilities" of 8(a) firms and "improve [their] ability to successfully compete for contracts" by providing various forms of assistance, including technical or management training, financial assistance in the form of equity investments or loans, subcontracts, trade education, and assistance in performing prime contracts with the federal government through joint venture agreements.[185]

Although the SBA established the 8(a) Mentor-Protégé Program and SBA rules govern participation in the program, the 8(a) Mentor-Protégé Program is government-wide in the sense that firms may enjoy the benefits of participation in the program while performing the contracts of any federal agency.[186] In fact, when agencies that do not have their own mentor-protégé programs are involved, the 8(a) Mentor-Protégé Program may be referred to as if it were that agency's program.[187]

The SBA's Office of Business Development (BD) administers the 8(a) Mentor-Protégé Program. This makes it somewhat different from agency-specific mentor-protégé programs, which are generally administered by the agency's Office of Small and Disadvantaged Business Utilization (OSDBU) and may involve coordination with agency contracting offices.[188]

SBA regulations govern various aspects of the 8(a) Mentor-Protégé Program, including who may qualify as a mentor or protégé, the content of written agreements between mentors and protégés, and the SBA's evaluation of the mentor-protégé relationship. For example, mentors must be for-profit concerns that demonstrate a commitment and the ability to assist developing 8(a) firms, including large firms, other small businesses, firms that have graduated from the program, and other 8(a) firms that are in the *transitional stage*, or final five years of the program.[189] Only SBA

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[183] For additional information and analysis of federal Mentor-Protégé Programs, see CRS Report R41722, *Small Business Mentor-Protégé Programs*, by Robert Jay Dilger.

[184] SBA, "Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals: Final Rule," 63 *Federal Register* 35739, June 30, 1998.

[185] 13 C.F.R. §124.520(a). See also GAO, *Small Business: SBA Could Better Focus Its 8(a) Program to Help Firms Obtain Contracts*, GAO/RCED-00-196, July 20, 2000, p. 14, at http://www.gao.gov/new.items/rc00196.pdf.

[186] For example, mentor-protégé joint ventures may qualify as *small* for purposes of contracts set aside for small businesses by any executive branch agency, not just by the SBA. The same is not necessarily true for joint ventures involving mentors and protégés in agency-specific programs. See SBA, "Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations," 74 *Federal Register* 55694, October 28, 2009 ("[A]n exception to affiliation for protégés in other Federal mentor/protégé programs will be recognized by SBA only where specifically authorized by statute (e.g., DOD's mentor/protégé program) or where SBA has authorized an exception to affiliation for a mentor/protégé program of another Federal agency under the procedures set forth in §121.903."). This requirement was incorporated in the final rule. See SBA, "Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations," 76 *Federal Register* 8222, 8223, February 11, 2011.

[187] See Listing of Mentor Protégé Programs, at http://www.eds-gov.com/mentorprotege/links.asp (characterizing the Department of Agriculture as having a "mentor-protégé office"). This is a reference to the Department of Agriculture's Office of Small and Disadvantaged Business Utilization, which provides information about the 8(a) Mentor-Protégé Program and other federal mentor-protégé programs. The department does not have its own mentor-protégé program.

[188] GAO, *Mentor-Protégé Programs Have Policies That Aim to Benefit Participants But Do Not Require Postagreement Tracking*, GAO-11-548R, June 15, 2011, p. 3, at http://www.gao.gov/new.items/d11548r.pdf. GAO identified mentor-protégé programs in 13 federal agencies.

[189] 13 C.F.R. §124.520(b). Previously, nonprofit entities were eligible to serve as mentors. For discussion concerning

approved firms may serve as mentors, and each mentor must (1) demonstrate that it "is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement";[190] (2) possess good character;[191] (3) not be debarred or suspended from government contracting; and (4) be able to "impart value to a protégé firm due to lessons learned and practical experienced gained because of the [8(a) program], or through its knowledge of general business operations and government contracting."[192]

Protégés, in turn, are required to be small businesses owned and controlled by socially and economically disadvantaged individuals that are in good standing in the 8(a) Program. Protégés must also qualify as small for the size standard corresponding to their primary (or, under specified circumstances, their secondary) North American Industry (NAICS) code and demonstrate how the business development assistance to be received through the mentor-protégé relationship would advance the goals and objectives set forth in their business plans.[193]

Mentors are generally expected to have only one protégé at a time. However, mentors may have up to three protégés at one time provided they can demonstrate that "the additional mentor/protégé relationship[s] will not adversely affect the development of either protégé firm."[194] Similarly, protégés are expected to have one mentor at a time. However, protégés may, under specified circumstances, have two mentors.[195]

Mentors and protégés are required to enter a written agreement, approved by the SBA's AA/BD which sets forth the protégé's needs and describes the mentor's assistance.[196] This agreement

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restricting eligibility to for profit entities, see SBA, "Small Business Mentor Protégé Program," 81 *Federal Register* 48562, 48563, July 25, 2016.

[190] Previously, SBA regulations required that prospective mentors submit their federal tax returns for the past two years to the SBA for review to demonstrate their "favorable financial health." 13 C.F.R. §124.520(b)(3) (2010). This requirement changed effective March 14, 2011, to authorize the submission of audited financial statements and Securities and Exchange Commission filings, as well as tax returns. See SBA, "Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations," 76 *Federal Register* 8243, February 11, 2011. Approved mentors are also required to certify annually that they continue to possess good character and a favorable financial position. 13 C.F.R. §124.520(b)(4). For discussion concerning the change from "favorable financial health" to "capable of carrying out its responsibilities," see SBA, "Small Business Mentor Protégé Program," 81 *Federal Register* 48563, July 25, 2016.

[191] *Good character* is not defined for purposes of this provision, although SBA regulations otherwise address what it means for individuals applying to the 8(a) program to possess good character. See 13 C.F.R. §124.108(a).

[192] 13 C.F.R. §124.520(b)(1)(i)-(iv).

[193] Previously, protégés were required to (1) be in the *developmental stage*, or the first four years of the 8(a) program; (2) have never received an 8(a) contract; or (3) have a size that is less than half the size standard corresponding to their primary North American Industry code. For discussion of the change in these requirements, see SBA, "Small Business Mentor Protégé Program," 81 *Federal Register* 48564, 48565, July 25, 2016.

[194] 13 C.F.R. §124.520(b)(2).

[195] 13 C.F.R. §124.520(c)(3). The specified circumstances are: "The AA/BD [Associate Administrator for Business Development] may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the business development assistance set forth in the first mentor/protégé relationship and either: (i) The second relationship pertains to a secondary NAICS code; or (ii) The protégé firm is seeking to acquire a specific expertise that the first mentor does not possess." Note: "the AA/BD may authorize a participant to be both a protégé and a mentor at the same time where the participant can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship." See SBA, "Small Business Mentor Protégé Program," 81 *Federal Register* 48584, July 25, 2016.

[196] 13 C.F.R. §124.520(e)(1). Pursuant to these regulations, the SBA will not approve the agreement if it determines that the assistance to be provided to the protégé is insufficient to promote any developmental gains, or the agreement is determined to be merely a vehicle to enable a non-8(a) firm to receive 8(a) contracts. 13 C.F.R. §124.520(e)(2). The regulations also provide that the SBA must approve all changes to the agreement in advance. 13 C.F.R. §124.520(e)(5).

generally obligates the mentor to furnish assistance to the protégé for at least one year,[197] although it does allow either mentor or protégé to terminate the agreement with 30 days' advance notice to the other party and the SBA.[198]

Unless rescinded in writing, the mentor-protégé agreement automatically renews for another year. The term of a mentor-protégé agreement is limited to three years but may be extended for a second three-year period.[199]

The 8(a) Mentor-Protégé Program is intended to benefit both mentors and protégés. Serving as a mentor to an 8(a) firm counts toward any subcontracting requirements to which the mentor firm may be subject under Section 8(d) of the Small Business Act.[200] Section 8(d) requires that all federal contractors awarded a contract valued in excess of $700,000 ($1.5 million for construction contracts) that offers subcontracting possibilities agree to a "subcontracting plan" that ensures small businesses have "the maximum practicable opportunity to participate in [contract] performance."[201]

In addition, in certain circumstances, mentors may form joint ventures with their protégés that are eligible to be awarded an 8(a) contract or another contract set aside for small businesses.[202] Mentor firms and joint ventures involving mentor firms would otherwise generally be ineligible for such contracts because they would not qualify as *small* under SBA regulations.[203] Mentor firms may also acquire an equity interest of up to 40% in the protégé firm in order to help the protégé firm raise capital.[204] Because mentor firms are not 8(a) participants, they would generally be prohibited from owning more than 10%-20% of an 8(a) firm.[205] However, their participation in the 8(a) Mentor-Protégé Program permits them to acquire a larger ownership share.

Protégés not only receive various forms of assistance from their mentors, but also may generally retain their status as "small businesses" while doing so.[206] If they received similar assistance from

[197] 13 C.F.R. §124.520(e)(1)(iii).

[198] 13 C.F.R. §124.520(e)(3).

[199] Protégés may have two three-year mentor-protégé agreements with different mentors, and each agreement may be extended an additional three years provided the protégé has received, and will continue to receive, the agreed-upon business development assistance. The SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not adequately benefiting from the relationship or that the parties are not complying with any of the agreement's terms or conditions. See SBA, "Small Business Mentor Protégé Program," 81 *Federal Register* 48585, July 25, 2016.

[200] 13 C.F.R. §125.3(b)(3)(ix).

[201] 15 U.S.C. §637(d)(3)(A).

[202] 13 C.F.R. §124.513(b)(3); 13 C.F.R. §124.520(d)(1). For the joint venture to be eligible for the award, the protégé must qualify as small for the size standard corresponding to the NAICS code assigned to the procurement, and, in the case of sole-source 8(a) procurements, has not "reached the dollar limit set forth in §124.519." 13 C.F.R. §124.520(d)(1). Section 124.519 generally prohibits 8(a) firms from receiving additional sole-source awards once they have received a combined total of competitive and sole-source awards in excess of $100 million, in the case of firms whose size is based on their number of employees, or in excess of an amount equivalent to the lesser of (1) $100 million or (2) five times the size standard for the industry, in the case of firms whose size is based on their revenues.

[203] See generally 13 C.F.R. §121.103.

[204] 13 C.F.R. §124.520(d)(2).

[205] 13 C.F.R. §124.105(h)(1)-(2). Ownership is limited to 10% when the 8(a) firm in is the "developmental stage" of the 8(a) program and 20% when it is in the "transitional stage." Ibid. The developmental stage consists of the first four years of the 8(a) program, while the transitional stage consists of the last five years.

[206] 13 C.F.R. §124.520(d)(3). But see 13 C.F.R. §121.103(b)(6) (noting that, while a protégé is not an affiliate of its mentor because it receives assistance from its mentor under the mentor-protégé program, "[a]ffiliation may be found … for other reasons").

entities other than their mentors, they could risk being found to be other than "small" because of how the SBA determines size. The SBA combines the gross income of the firm, or the number of its employees, with those of its "affiliates" when determining whether the firm is small,[207] and the SBA could potentially find that firms are affiliates because of assistance such as that which mentors provide to protégés.[208] However, SBA regulations provide that "[n]o determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor-protégé agreement or any assistance provided pursuant to the agreement."[209]

As of September 30, 2017, there were 314 active 8(a) mentor-protégé agreements.[210]

8(a) Program Statistics

As shown in **Table 3**, since FY2010, the numbers of certified 8(a) firms (i.e., firms that participated in the program for at least one day during the fiscal year) and 8(a) firms that completed their required annual review have generally declined. For example, in FY2016, there were 5,447 certified firms and 4,495 firms that completed the required annual review, compared with 8,444 and 7,720, respectively, in FY2010. The SBA indicated that "based on customer and stakeholder feedback, a contributing factor to this decline is believed to be the administratively burdensome application process."[211]

As mentioned previously, to address this issue, in 2016, the SBA implemented a streamlined application pilot project requiring fewer documents and hosted monthly outreach events and webinars to assist small businesses in learning how to apply for the 8(a) program.[212] The SBA has also indicated that it is seeking the Office of Management and Budget's approval to expand the use of the new application forms and, without providing details, "plans to reduce the administrative burdens of the annual review process."[213]

Table 3. 8(a) Program Statistics, FY2010-FY2017

Fiscal Year	Number of Certified 8(a) Firms	Number of Certified 8(a) Firms that Completed their Required Annual Review	SBA Administrative Costs ($ in millions)
2017 (as of March 3, 2017)	5,112	not currently available	$54.099
2016	5,447	4,495	$47.281
2015	5,399	4,868	$55.600

[207] 13 C.F.R. §§121.101-121.108. Firms are "affiliates" when "one controls or has the power to control the other, or a third party or parties controls or has the power to control both." 13 C.F.R. §121.103(a)(1).

[208] See generally 13 C.F.R. §121.103.

[209] 13 C.F.R. §124.520(d)(4).

[210] SBA, "FY2019 Congressional Budget Justification and FY2017 Annual Performance Report," p. 78, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_19_508Final5_1.pdf.

[211] SBA, *FY2017 Congressional Budget Justification and FY2015 Annual Performance Report*, p. 52, at https://www.sba.gov/sites/default/files/FY17-CBJ_FY15-APR.pdf.

[212] Ibid.

[213] Ibid.; and SBA, Office of Congressional and Legislative Affairs, "Correspondence with the author," March 30, 2017.

Fiscal Year	Number of Certified 8(a) Firms	Number of Certified 8(a) Firms that Completed their Required Annual Review	SBA Administrative Costs ($ in millions)
2014	5,951	5,492	$53.824
2013	6,659	6,241	$51.649
2012	7,390	6,252	$60.855
2011	7,814	6,478	$58.274
2010	8,444	7,720	$56.817

Source: U.S. Small Business Administration, Office of Business Development, "Report to the U.S. Congress on Minority Small Business and Capital Ownership Development," (FYs 2010-2014), at https://www.sba.gov/offices/headquarters/obd/resources/14264 (number of certified 8(a) firms, FY2010-2014); U.S. Small Business Administration, Office of Congressional and Legislative Affairs, "Correspondence with the author," March 30, 2017 (number of certified 8(a) firms, FY2015-2017); U.S. Small Business Administration, "FY2017 Congressional Budget Justification and FY2015 Annual Performance Report," pp. 101, 134, at https://www.sba.gov/sites/default/files/FY17-CBJ_FY15-APR.pdf; and U.S. Small Business Administration, "FY2019 Congressional Budget Justification and FY2017 Annual Performance Report," p. 73, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_19_508Final5_1.pdf.

Note: A certified 8(a) firm is defined as a firm that participated in the 8(a) program for at least one day during the fiscal year.

Table 3 also shows the SBA's administrative costs for the 8(a) Program since FY2010. In FY2017, the SBA spent $54.009 million on 8(a) Program administration.

As shown in **Table 4**, in FY2017, 8(a) firms were awarded $27.167 billion in federal contracts (5.14% of all federal contracts awarded). Of that amount, these firms received $7.971 billion through an 8(a) set-aside award, $8.445 billion through an 8(a) sole-source award, and $6.110 billion through either open competition or with another small business preference applied (e.g., small business set-aside and HUBZone set-aside or sole-source award).

From FY2010 through FY2017, 8(a) firms were awarded, on average, approximately 5.45% of the total amount of federal contracts awarded, ranging from a low of 4.97% of all federal contracts in FY2011 to a high of 6.11% in FY2014.

During this period, 8(a) firms received about $214.902 billion in federal contracts: $58.609 billion through an 8(a) set-aside (27.2% of all 8(a) contracts), $73.544 billion through an 8(a) sole-source award (34.3% of all 8(a) contracts), and $82.749 billion through either open competition or with another small business preference applied (38.5% of all 8(a) contracts).

Table 4. Federal Contract Amount Awarded to 8(a) Firms, by Award Type, FY2010-FY2017

($ in billions)

Fiscal Year	8(a) Set-Aside	8(a) Sole-Source	Other 8(a) Awards	8(a) Total	8(a) Total as a % of All Federal Contracts Awarded
2017	$7.971	$8.445	$10.752	$27.168	5.14% of $508.506
2016	$8.533	$8.710	$10.318	$27.561	5.82% of $473.415
2015	$8.064	$8.423	$9.752	$26.239	5.97% of $439.623
2014	$7.882	$9.024	$10.351	$27.257	6.11% of $445.837

Fiscal Year	8(a) Set-Aside	8(a) Sole-Source	Other 8(a) Awards	8(a) Total	8(a) Total as a % of All Federal Contracts Awarded
2013	$6.649	$7.745	$9.955	$24.349	5.26% of $463.119
2012	$6.778	$9.309	$11.325	$27.412	5.28% of $519.554
2011	$6.360	$10.408	$10.017	$26.785	4.97% of $538.897
2010	$6.372	$11.480	$10.279	$28.131	5.21% of $540.121
Total	**$58.609**	**$73.544**	**$82.749**	**$214.902**	**5.45% of $3,929.072**

Source: U.S. General Services Administration, Federal Procurement Data System—Next Generation (FPDS), accessed on April 17, 2017 and March 15, 2018, at https://www.fpds.gov/fpdsng_cms/index.php/en/.

Notes: Other 8(a) awards include contracts awarded through open competition or with other small business preferences applied (e.g., small business set-aside and HUBZone set-aside or sole-source award). The FPDS is the most comprehensive data system available for federal contract awards. It includes federal contracts whose estimated value is $3,000 or more.

Current Issues

The SBA faces several challenges concerning the 8(a) Program, including a recent decline in participation, reported variation in program service delivery, disagreements related to the program's financial thresholds used to determine economic disadvantage, and concerns related to the performance measures used to evaluate the program's success.

Declining Participation

Noting that the number of certified 8(a) firms had declined from 2010 to 2015, the SBA announced in 2015 that it was establishing a goal to "increase the number of approved firms" in the program by 5% in FY2016 and FY2017.[214] In an effort to achieve this goal and increase 8(a) Program retention, the SBA

- initiated a pilot program to streamline the program's application process;
- increased its marketing of the 7(j) Management and Training Assistance Program to 8(a) firms;
- increased its efforts to expand the 8(a) Mentor-Protégé Program by streamlining that program's application process, shortening its application response time from 45 days to 10 days, and initiating an annual mentor-protégé conference to help 8(a) firms become more knowledgeable about the potential benefits of joint ventures and the various rules and compliance requirements for mentor-protégé agreements.[215]

The SBA presented four reasons to streamline the program's application process:

1. Although regulatory guidance provides the SBA approximately 90 days to process a complete application, several firms endured delays that extended anywhere from six months to several years.

[214] SBA, *FY2017 Congressional Budget Justification and FY2015 Annual Performance Report*, p. 52, at https://www.sba.gov/sites/default/files/FY17-CBJ_FY15-APR.pdf.

[215] Ibid., p. 50.

2. Nearly three-quarters of 8(a) applications are initially rejected due to incomplete or missing documentation.
3. Less than half of complete applications are approved.
4. The SBA's low rate of approval has led to an industry of third party firms that charge 8(a) applicants from $5,000 to $75,000 to prepare the application and respond to the SBA's processors. The SBA argued that some of these firms are taking advantage of applicants, and regardless of the amount paid, there is no guaranteed approval because the approval rate is consistently less than 50%.[216]

The SBA reported that it certified 568 applicants to the 8(a) Program in FY2015 (before the streamlined process), 911 in FY2016 (after the streamlined process was instituted on a pilot basis), and 557 in FY2017.[217] The agency declared the pilot streamlined application process a success. However, the SBA's OIG has argued that shortening the review process by eliminating required documents may erode core safeguards that prevented questionable firms from entering the program:

> Federal prosecutors have told OIG that it would be difficult for them to describe SBA, the procuring agency, or honest 8(a) competitors as fraud victims when SBA is perceived not to have exercised proper due diligence in admitting firms' into the 8(a) Program. Although SBA's efforts to increase the participation in the 8(a) Program is commendable, SBA still needs to ensure that only eligible firms are admitted into the program, and the documentation supporting 8(a) Program application approvals is maintained in a method ensuring clear eligibility of the applicant.[218]

In a related development, a recent SBA OIG audit of the 8(a) Program's application determination process found that the SBA did not always document why the AA/BD approved applications even though lower-level "reviewers [had] identified one or more eligibility issues" with the applications.[219] The OIG concluded that this lack of documentation resulted in "potentially ineligible firms" being accepted into the program. To address this situation, the SBA agreed with the OIG's recommendation to clearly document, in its Business Development Management Information System (BDMIS) which tracks 8(a) Program applications, justifications for approval when they differ from that of lower-level reviewers. The SBA asserted that this lack of documentation was not an indication that ineligible firms were being certified into the program without adequate review.

Reported Variation in Service Delivery

Witnesses at congressional hearings have reported that common Business Opportunity Specialists (BOS) practices, including the interpretation and implementation of standardized policies and

[216] John Shoroka, SBA Office of Government Contracting and Business Development and Jackquline L. Robinson-Burnette, SBA Office of Government Contracting and Business Development, "Grow the number of 8(a)-certified disadvantaged small businesses," at https://www.performance.gov/content/grow-number-8a-certified-disadvantaged-small-businesses.

[217] Ibid; and SBA, *FY2019 Congressional Budget Justification and FY2017 Annual Performance Report*, p. 72, at https://www.sba.gov/sites/default/files/aboutsbaarticle/SBA_FY_19_508Final5_1.pdf.

[218] SBA, OIG, *Report on the Most Serious Management and Performance Challenges in Fiscal Year 2017*, Report Number 17-02, October 14, 2016, p. 11, at https://www.sba.gov/sites/default/files/oig/FY_2017_-_Management_Challenges_-_10_14_16_7.pdf.

[219] SBA OIG, *SBA's 8(a) Business Development Program Eligibility*, Report Number 16-13, April 7, 2016, p. 4, at https://www.sba.gov/sites/default/files/oig/16-13_SBAs_8a_Business_Development_Program_Eligibility.pdf.

procedures, vary from SBA district office to SBA district office and across state lines.[220] Some Members of Congress have argued that "many of the problems with … BOS advocates are compounded by the fact that" the position's responsibilities are not laid out in statute.[221] Instead, they argue, the position's responsibilities "have been left to develop with SOPs [Standard Operating Procedures] and common practices."[222] They have also asserted that BOSs are "often pulled by their district offices to help with other small business programs rather than overseeing the 8(a) participants as intended."[223]

During the 115th Congress, P.L. 115-91, the National Defense Authorization Act for Fiscal Year 2018, among other provisions, amended the Small Business Act to clarify the responsibilities of Business Opportunity Specialists by providing them a statutory list of duties.[224]

Those concerned about variation in 8(a) Program service delivery also note that a 2010 GAO report found a "breakdown in communication between SBA district offices and headquarters … that resulted in inconsistencies in the way district offices delivered the program."[225] In addition, in 2015, GAO indicated that the SBA's overlapping organizational structure may contribute to variation in 8(a) Program service delivery:

> SBA's organizational structure often results in working relationships between headquarters and field offices that differ from reporting relationships, potentially posing programmatic challenges. District officials work with program offices at SBA's headquarters to

[220] U.S. Congress, House Committee on Small Business, *Defending America's Small Contractors Act of 2016*, report to accompany H.R. 4341, 114th Cong., 2nd sess., July 25, 2016, H.Rept. 114-704 (Washington: GPO, 2016), pp. 10, 18.

[221] U.S. Congress, House Committee on Small Business, Subcommittee on Contracting and Workforce, *Supporting Success: Empowering Small Business Advocates*, 114th Cong., 1st sess., December 9, 2015, H.Comm.Doc 114-033 (Washington: GPO, 2015), p. 3.

[222] Ibid. A new SOP for the 8(a) Program was released in 2016. See SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

[223] U.S. Congress, House Committee on Small Business, Subcommittee on Contracting and Workforce, *Supporting Success: Empowering Small Business Advocates*, 114th Cong., 1st sess., December 9, 2015, H.Comm.Doc 114-033 (Washington: GPO, 2015), p. 3.

[224] The act amended Section 4(g) of the Small Business Act by adding

> (1) DUTIES.—The exclusive duties of a Business Opportunity Specialist employed by the Administrator and reporting to the senior official appointed by the Administrator with responsibilities under sections 8, 15, 31, and 36 (or the designee of such official) shall be to implement sections 7, 8, and 45 and to complete other duties related to contracting programs under this Act. Such duties shall include—(A) with respect to small business concerns eligible to receive contracts and subcontracts pursuant to section 8(a)—(i) providing guidance, counseling, and referrals for assistance with technical, management, financial, or other matters that will improve the competitive viability of such concerns; (ii) identifying causes of success or failure of such concerns; (iii) providing comprehensive assessments of such concerns, including identifying the strengths and weaknesses of such concerns; (iv) monitoring and documenting compliance with the requirements of sections 7 and 8 and any regulations implementing those sections; (v) explaining the requirements of sections 7, 8, 15, 31, 36, and 45; and (vi) advising on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of such a contract or subcontract; (B) reviewing and monitoring compliance with mentor-protégé agreements under section 45; (C) representing the interests of the Administrator and small business concerns in the award, modification, and administration of contracts and subcontracts awarded pursuant to section 8(a); and (D) reporting fraud or abuse under section 7, 8, 15, 31, 36, or 45 or any regulations implementing such sections.

[225] GAO, Small Business Administration: Steps Have Been Taken to Improve Administration of the 8(a) Program, but Key Controls for Continued Eligibility Need Strengthening, GAO-10-353, March 30, 2010, pp. 13, 14, 25, 26, at http://www.gao.gov/assets/310/302582.pdf.

> implement the agency's programs, but these officials report to regional administrators, who themselves report to the Office of Field Operations. For example, … business opportunity specialists in the district offices work with the Office of Government Contracting and Business Development at SBA headquarters to assist small businesses with securing government contracts but report to district office management.[226]

During the 114th Congress, legislation (H.R. 4341) was introduced to require GAO to review the SBA's Office of Government Contracting and Business Development (GCBD) and make recommendations to address several administrative concerns, including issues related to the SBA's organizational overlap.[227]

In a related development, GAO reported that a "skill gap" among BOSs may also contribute to the possibility of variation in the program's service delivery.

GAO noted that the SBA's Office of Field Operations (OFO) revised its field office operations in 2012 following a 2010 review of all position descriptions to ensure that the descriptions aligned with the SBA's strategic plan and district office strategic plans. The SBA informed GAO that it undertook this review because district office staff were given new responsibilities after the SBA moved loan processing from district offices to loan processing centers in 2004. Before the review, district office staff had two principal program delivery positions, lender relations specialist and business development specialist. As a result of the review, descriptions for both of these positions were rewritten and the business development position was split into two separate positions, economic development specialist and business opportunity specialist. The skills and competencies for the new position descriptions focused on the change in the district office's function from loan processing to program compliance and community outreach. Staff were retrained for the rewritten positions.

The SBA reported that the change in the position descriptions created a "skill gap" because employees who were originally required to have a financial background for loan processing were now required to have different skills, such as a marketing background and interpersonal skills needed for assisting and overseeing 8(a) firms and conducting outreach to small businesses.[228]

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[226] GAO, *Small Business Administration: Leadership Attention Needed to Overcome Management Challenges*, GAO-15-347, September 22, 2015, p. 59, at http://www.gao.gov/assets/680/672648.pdf; and GAO, *Major Management Challenges and Program Risks: Small Business Administration*, GAO-03-116, January 1, 2003, p. 27, at http://www.gao.gov/assets/240/237003.pdf.

[227] H.R. 4341, the Defending America's Small Contractors Act of 2016. at §505. GAO Review of the Office of Government Contracting and Business Development of the Small Business Administration. (a) STUDY.—Not later than 60 days after the date of the enactment of this Act, the Comptroller General of the United States shall initiate a review of the Office of Government Contracting and Business Development of the Small Business Administration. Such review shall examine the extent to which the personnel of the Small Business Administration who carry out procurement and business development programs report to the Office of Government Contracting and Business Development; (2) whether greater efficiency and consistency in the certification process of procurement and business development programs could be achieved by creating a single organizational unit of employees to process all certifications required by procurement and business development programs; (3) whether greater efficiency and efficacy in the performance of procurement and business development programs could be achieved by improving the alignment of the field personnel assigned to such programs; (4) how the Office of Government Contracting and Business Development could improve its staffing of regulatory drafting functions and its coordination with the Federal Acquisition Regulatory Council to ensure timely rulemaking by the Small Business Administration; and (5) any other areas in which the Comptroller General determines that the Small Business Administration could improve its performance with respect to procurement and business development programs.

[228] GAO, *Small Business Administration: Leadership Attention Needed to Overcome Management Challenges*, GAO-15-347, September 22, 2015, pp. 44, at http://www.gao.gov/assets/680/672648.pdf; and GAO, *Small Business Administration: Views on the Operational Effects of Closing Regional Offices*, GAO-15-369, September 22, 2015, p.

The SBA informed GAO that the skill gap was particularly pronounced among 885 employees in two job series, GS-1101 and GS-1102, including BOSs, economic development specialists, and procurement staff, and that despite its efforts to address this skill gap through training and offering early retirement and separation incentives in FY2012 and FY2014 in an effort to restructure its personnel, "the competency gap remains."[229] The SBA also noted that its skill gap had been compounded by recent changes in job requirements and new initiatives that require new skill sets for its employees. For example, P.L. 114-92, the National Defense Authorization Act of FY2016, requires BOSs to obtain federal acquisition certification in contracting as a prerequisite for employment.[230]

Arguably, the SBA's relatively recent issuance of a new 300-page SOP (effective September 2016) for the Office of Business Development, which oversees the 8(a) Program, may help to address the reported skill gap. The new SOP provides all SBA staff, including BOSs, specific guidance concerning their roles and responsibilities in 8(a) Program service delivery.

Oversight of 8(a) Program Participant's Continuing Eligibility

As mentioned previously, two SBA offices, the GCBD and the OFO, share responsibility for overseeing the 8(a) Program. Within GCBD, BOSs assigned to the Office of Certification and Eligibility (OCE) evaluate all 8(a) program applications and conduct continuing eligibility reviews of "high-risk" or "complex" 8(a) firms, including those firms with total 8(a) revenue exceeding $10 million, are part of a joint venture, are party to a mentor-protégé agreement, or are an entity-owned firm such as an Alaska Native Corporation, and those that are requested from district office field staff.[231] However, an SBA OIG audit found that the OCE reviewed the continuing eligibility of less than half of the firms identified as high risk in FY2016 (352 of 859 firms, or 41%) and in FY2017 (350 of 798 firms, or 44%).[232]

28, at http://www.gao.gov/assets/680/672679.pdf.

[229] GAO, *Small Business Administration: Leadership Attention Needed to Overcome Management Challenges*, GAO-15-347, September 22, 2015, pp. 44-46, at http://www.gao.gov/assets/680/672648.pdf.

[230] P.L. 114-92, the National Defense Authorization Act of FY2016, at §865. Certification requirements for Business Opportunity Specialists, commercial market representatives, and procurement center representatives.

> (g) Certification Requirements for Business Opportunity Specialists-(1) IN GENERAL- Consistent with the requirements of paragraph (2), a Business Opportunity Specialist described under section 7(j)(10)(D) shall have a Level I Federal Acquisition Certification in Contracting (or any successor certification) or the equivalent Department of Defense certification, except that a Business Opportunity Specialist who was serving on or before January 3, 2013, may continue to serve as a Business Opportunity Specialist for a period of 5 years beginning on such date without such a certification. (2) DELAY OF CERTIFICATION REQUIREMENT-(A) TIMING- The certification described in paragraph (1) is not required for any person serving as a Business Opportunity Specialist until the date that is one calendar year after the date such person is appointed as a Business Opportunity Specialist. (B) APPLICATION- The requirements of subparagraph (A) shall—(i) be included in any initial job posting for the position of a Business Opportunity Specialist; and (ii) apply to any person appointed as a Business Opportunity Specialist after January 3, 2013.

[231] SBA OIG, *Improvements Needed in SBA's Oversight of 8(a) Continuing Eligibility Processes*, Report Number 18-22, September 7, 2018, pp. 1, 2, at https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report_18-22.pdf; and SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 212, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

[232] SBA OIG, *Improvements Needed in SBA's Oversight of 8(a) Continuing Eligibility Processes*, Report Number 18-22, September 7, 2018, p. 4, at https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report_18-22.pdf.

Within OFO, BOSs in each of the SBA's 68 district offices work directly with their assigned 8(a) firms and, among other duties, conduct annual reviews of those firms' progress toward achieving the targets, objectives, and goals set forth in their business development plan. According to the 8(a) Program's Standard Operating Procedures (SOP) manual, BOSs in each of the SBA's 68 district offices conduct continuing eligibility reviews for all 8(a) firms not reviewed by the GCBD to ensure their compliance with all continuing eligibility requirements during the annual review process.[233] However, in practice, the SBA OIG's audit found that district office BOSs assess continuing eligibility as part of the annual review process for all 8(a) firms, including those deemed to be high risk or complex.[234]

The SBA is also required to review the participant's continuing eligibility "upon receipt of specific and credible information alleging that a participant no longer meets the eligibility requirements."[235] Generally, the SBA receives this information from the SBA OIG's Hotline.[236] However, the SBA OIG's audit found that the OCE did not conduct continuing eligibility reviews for any of the 44 OIG Hotline complaints that were referred to the GCBD from October 1, 2015, through May 4, 2017. In addition, GCBD did not inform district office BOSs of complaints filed against firms within their purview. As a result, district office BOSs took no action regarding the complaints.[237]

The SBA OIG's audit reviewed the continuing eligibility of two samples of 8(a) firms to determine whether the SBA's continuing eligibility review process "consistently identify ineligible firms enrolled in the program": the 15 individually owned 8(a) firms with the highest set-aside dollars in FY2016 that were scheduled to have continuing eligibility reviews within the first half of FY2017 and 10 individually owned 8(a) firms that were identified as being ineligible in Hotline complaints received between October 1, 2015, and May 4, 2017.[238]

The SBA OIG found that "despite OCE and district offices having shared responsibility for assessing 8(a) firms' continuing eligibility, they did not detect that 4 of the 15 individually-owned 8(a) firms we reviewed were ineligible for the 8(a) Program," and "our review of the 10 firms referred by the OIG Hotline revealed that they were all ineligible for the 8(a) program, based on issues such as excessive income and lack of good character."[239] In addition, the SBA OIG found that the SBA had identified eligibility concerns through its annual reviews and continuing eligibility reviews for 6 of the 15 individually owned 8(a) firms the OIG had reviewed, but "did not take timely action to remove these firms from the 8(a) Program or document resolution of eligibility issues."[240]

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[233] SBA, Office of Business Development, "Standard Operating Procedure for the Office of Business Development," SOP 80 05 5, effective September 23, 2016, p. 212, at https://www.sba.gov/sites/default/files/sops/SOP_80_05_5_.pdf.

[234] SBA OIG, *Improvements Needed in SBA's Oversight of 8(a) Continuing Eligibility Processes*, Report Number 18-22, September 7, 2018, p. 2, at https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report_18-22.pdf.

[235] Ibid.

[236] The SBA OIG's Hotline is a web page that provides visitors the option of filing a written complaint by clicking on a link on the web page or by sending the complaint to the SBA OIG by mail or courier. The Hotline also provides a toll-free telephone number (800) 767-0385. See SBA, OIG, "Hotline," at https://www.sba.gov/oig/hotline

[237] SBA OIG, *Improvements Needed in SBA's Oversight of 8(a) Continuing Eligibility Processes*, Report Number 18-22, September 7, 2018, p. 9, at https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report_18-22.pdf.

[238] Ibid., p. 14.

[239] Ibid., pp. 4, 9.

[240] Ibid., p. 7.

The SBA OIG concluded that 20 of the 25 firms it reviewed should have been removed from the 8(a) Program and made 11 recommendations "to improve the overall management and effectiveness" of the 8(a) Program's continuing eligibility review process.[241] SBA management agreed with seven of the recommendations, partially agreed to the other four recommendations, and indicated that it would conduct continuing eligibility reviews for the firms identified in the SBA OIG's audit as ineligible and take appropriate action.[242]

Financial Thresholds for Economic Disadvantaged Status

Section 8(a)(6)(A) of the Small Business Act defines economically disadvantaged individuals as "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." In determining the degree of diminished credit and capital opportunities, Section 8(a)(6)(A) authorizes the SBA to "consider, but not be limited to, the assets and net worth of such socially disadvantaged individual."

As mentioned previously, in 1989, the SBA established by regulation that personal net worth of less than $250,000 at the time of entry into the program (and $750,000 for continuing eligibility) constitutes economic disadvantage.[243]

Some Members of Congress have argued that these financial thresholds should be increased or periodically adjusted for inflation. During the 112th Congress, H.R. 3754, the Not Too Small to Succeed in Business Act of 2011, would have increased these thresholds to $750,000 for 8(a) Program admission and $2.25 million for continued participation after admission. H.R. 2424, the Expanding Opportunities for Main Street Act of 2011, would have amended Section 8(a)(6)(A)

[241] The recommendations are (1) Coordinate with the Associate Administrator for the Office of Field Operations to improve the transfer of continuing eligibility review documents for high risk firms from the district offices to the Office of Certification and Eligibility; (2) Revise its current process to ensure that it accurately identifies all high risk firms to receive continuing eligibility reviews from the Office of Certification and Eligibility; (3) Establish and implement clear policies and procedures for evaluating 8(a) continuing eligibility, including ensuring that district offices use standardized analysis tools that conform with 8(a) continuing eligibility requirements found in 13 CFR 124, and train employees on these procedures; (4) Develop and implement a comprehensive oversight plan to ensure completion of continuing eligibility reviews of all 8(a) firms, monitor the quality of continuing eligibility reviews, and eliminate duplication between the Office of Certification and Eligibility and the district offices; (5) Conduct continuing eligibility reviews for the firms that we identified as ineligible that are still active in the 8(a) program, and take timely action to remove firms found to be ineligible; (6) Develop and implement a centralized process to track and document all adverse actions and voluntary withdrawals from the 8(a) program, from recommendation through resolution; (7) Establish and implement clear policies and procedures that include timelines for sending Notices of Intent to Terminate and to Graduate Early firms after eligibility issues are first identified; (8) Conduct continuing eligibility reviews for the firms we identified as ineligible that are still active in the 8(a) program, and take timely action to remove firms found to be ineligible; (9) Establish and implement clear policies and detailed procedures, consistent with 13 CFR 124.112(c), to timely and effectively review and address complaints regarding 8(a) continuing eligibility, including communicating the content of the complaint to the district office, and train employees implementing the 8(a) program on the updated procedures; (10) Develop a robust system for tracking complaints that are received regarding firms' continuing eligibility for the 8(a) program, and tracking the actions taken to address the complaints; and (11) Conduct continuing eligibility reviews, including assessing the allegations in the 77 OIG Hotline complaints, for the firms that were the subject of the complaints that are still active in the 8(a) program, and for which the complainant provided specific and credible information, and, if necessary, take appropriate action to remove ineligible firms from the 8(a) program. See ibid., pp. 5, 6, 8, 11-13.

[242] Ibid., pp. 11-13. SBA management concurred with recommendations (2), (3), (6), (7), (9), (10), and (11) and partially concurred with recommendations (1), (4), (5), and (8) listed above.

[243] SBA, "Minority Small Business and Capital Ownership Development Program: Final Rule," 54 *Federal Register* 34692, August 21, 1989 (codified, as amended, at 13 C.F.R. §124.104(c)).

by inserting after "disadvantaged individual" the following: "For purposes of this section, an individual having a net worth of more than $1,500,000 is not economically disadvantaged." Legislation with provisions similar to those in H.R. 2424 was also introduced during the 113th Congress (H.R. 2550, the Minority Small Business Enhancement Act of 2013, and H.R. 2551, the Expanding Opportunities for Main Street Act of 2013).

Advocates for increasing the program's personal net worth threshold noted that the Department of Transportation (DOT) increased the personal net worth threshold for determining eligibility for the Disadvantaged Business Enterprise (DBE) program in 2011 to account for inflation. The DBE threshold was increased from $750,000 (which was set by DOT in 1999, and was based on the 8(a) Program's $750,000 threshold) to $1.32 million.[244] DBE firms, which are provided special consideration in the awarding of federal transportation contracts, argued that the limit penalized success and imposed "a glass ceiling on the growth and competitiveness of DBE firms."[245] Opponents argued that the $1.32 million limit was too high and would include business owners who were not truly disadvantaged and that raising the limit would favor larger, established, and richer DBEs at the expense of smaller, start-up firms because the larger companies would be able to stay in the program longer.[246]

More recently, the SBA's OIG has argued that the SBA's 1989 decision to exclude equity in a primary residence from an individual's net worth calculation "serves as a loophole allowing affluent business owners to shelter wealth in personal real estate, while taking advantage of a program designed to help the socially and economically disadvantaged."[247]

Measuring Program Success

Pursuant to P.L. 100-656, the Business Opportunity Development Reform Act of 1988, the SBA is required to "develop and implement a process for the systematic collection of data on the

[244] U.S. Department of Transportation (DOT), Office of the Secretary, "Disadvantaged Business Enterprise: Program Improvements," 75 *Federal Register* 25817, May 10, 2010; and DOT, Office of the Secretary, "Disadvantaged Business Enterprise: Program Improvements," 76 *Federal Register* 5085, January 8, 2011 (codified at 49 C.F.R. §26.67(a)(2)(i)).

The DBE program's personal net worth inflation adjustment in 2011 used 1989 as the base year, even though DOT adopted the personal net worth limit in 1999. DOT argued that it was appropriate to use 1989 as the base year because the SBA's standard, which DOT used, was adopted in 1989 and had not been adjusted for inflation at any time. See DOT, Office of the Secretary, "Disadvantaged Business Enterprise: Program Improvements," 76 *Federal Register* 5086, January 8, 2011.

[245] U.S. Department of Transportation, Office of the Secretary, "Disadvantaged Business Enterprise: Program Improvements," 75 *Federal Register* 25817, May 10, 2010. …DBE regulations require state and local transportation agencies that receive DOT financial assistance, to establish goals for the participation of DBEs. Each DOT-assisted State and local transportation agency is required to establish annual DBE goals, and review the scopes of anticipated large prime contracts throughout the year and establish contract-specific DBE subcontracting goals. …There has been, since 1983, a statutory provision requiring DOT to ensure that at least 10% of the funds authorized for the highway and transit financial assistance programs be expended with DBEs. DOT has established a single DBE goal, encompassing both firms owned by women and minority group members. See U.S. Department of Transportation, "Disadvantaged Business Enterprise (DBE) Program," at https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise.

[246] U.S. Department of Transportation, Office of the Secretary, "Disadvantaged Business Enterprise: Program Improvements," 76 *Federal Register* 5085, January 8, 2011.

[247] SBA, Office of Inspector General (SBA OIG), *Report on the Most Serious Management and Performance Challenges in Fiscal Year 2017*, Report Number 17-02, October 14, 2016, p. 12, at https://www.sba.gov/sites/default/files/oig/FY_2017_-_Management_Challenges_-_10_14_16_7.pdf.

operations of the [8(a)] Program" and to report this data, not later than April 30 of each year, to Congress.[248] The act requires the report to include the following:

- The average personal net worth of individuals who own and control concerns that were initially certified for program participation during the immediately preceding fiscal year and the dollar distribution of each of these individual's net worth, at $50,000 increments.
- A description and estimate of the benefits and costs that have accrued to the economy and the federal government in the immediately preceding fiscal year due to the operations of those business concerns that were performing 8(a) contracts.
- A compilation and evaluation of those business concerns that have exited the program during the immediately preceding three fiscal years, including the number of concerns actively engaged in business operations, those that have ceased or substantially curtailed operations, including the reasons for such actions, and those concerns that have been acquired by other firms or organizations owned and controlled by other than socially and economically disadvantaged individuals. For those businesses that have continued operations after they exited from the program, the SBA Administrator is required to separately detail the benefits and costs that have accrued to the economy during the immediately preceding fiscal year due to their operations.
- A listing of all program participants during the preceding fiscal year identifying, by state and region, for each firm: the concern's name, the race or ethnicity, and gender of the disadvantaged owners, the dollar value of all contracts received in the preceding year, the dollar amount of advance payments received by each concern pursuant to contracts awarded under Section 8(a), and a description including (if appropriate) an estimate of the dollar value of all benefits and loans received during such year.
- The total dollar value of 8(a) contracts and options awarded during the preceding fiscal year and such amount expressed as a percentage of total sales of all firms participating in the program during such year; and of firms in each of the nine years of program participation.
- A description of additional resources or program authorities required to provide the types of services needed over the next two-year period to service the expected portfolio of 8(a) certified firms.
- The total dollar value of 8(a) contracts and options, at such dollar increments as the SBA Administrator deems appropriate, for each four digit standard industrial classification code under which such contracts and options were classified.

The SBA's FY2014 report (the latest one available) indicated that 8(a) firms "contributed an estimated 158,018 jobs to the Nation's economy," and that 2,209 of the 2,288 firms that had exited and completed the program during the three preceding fiscal years (October 1, 2010 through September 30, 2013) were still active, 45 had ceased operations, and 34 did not have data available for determining their status as reported by Dun and Bradstreet. Of the active firms, "two were acquired by another firm or organization owned and controlled by other than socially and

[248] P.L. 100-656, the Business Opportunity Development Reform Act of 1988, §408. Data Collection, 102 Stat. 3877, 15 U.S.C. §636(j)16(A)(B)(C).

economically disadvantages individuals and 144 firms were substantially curtailed within the past three years."[249] In addition, the 2,209 still active firms reported FY2014 revenue of approximately $5.49 billion and provided jobs for approximately 70,330 persons.[250]

In 2000, GAO recommended that the SBA augment its data collection activities by periodically surveying a nationwide sample of 8(a) firms. GAO argued that a survey would improve the SBA's ability to determine how well the program is working, further arguing that "at a minimum, the survey should assess whether SBA assistance is meeting the firms' expectations and needs."[251]

The SBA currently contracts with a third-party to conduct an annual client satisfaction survey of small businesses that have received management training and technical assistance from Small Business Development Centers, SCORE, and Women Business Centers. The survey's objective is to measure these programs' impact "on the creation, financial development and survival of client firms."[252] The wording of many of that survey's questions, which focus on client satisfaction and the programs' impact on client behavior and economic success, could prove useful should the SBA decide to conduct a nationwide survey of 8(a) firms.

[249] SBA, Office of Business Development, "FY2014 408 Report to the Congress," p. 4, at https://www.sba.gov/sites/default/files/resources_articles/FY_14_408_Report.pdf.

[250] Ibid.

[251] GAO, *Small Business: SBA Could Better Focus Its 8(a) Program to Help Firms Obtain Contracts*, GAO-RCED-00-196, July 20, 2000, p. 23, at http://www.gao.gov/assets/240/230496.pdf.

[252] SBA, "Impact Study of Entrepreneurial Dynamics: Office of Entrepreneurial Development Resource Partners' Face-to-Face Counseling," Concentrance Consulting Group, Inc., September 2013, p. 1, at https://www.sba.gov/sites/default/files/files/OED_ImpactReport_09302013_Final.pdf.

Appendix. Comparison of the Requirements Pertaining to Different Types of 8(a) Firms

Table A-1. Requirements for Different Types of 8(a) Firms

Category	8(a) Firms Generally	Tribally Owned	ANC-Owned	NHO-Owned	CDC-Owned
"Small"	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) All affiliations count (13 C.F.R. §121.103)	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the tribe or tribal ownership, among others, do not count (15 U.S.C. §636(j)(10)(J)(ii); 13 C.F.R. §124.109(c)(2))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the ANC or ownership by the ANC, among others, do not count (15 U.S.C. §636(j)(10)(J)(ii); 13 C.F.R. §124.109(c)(2))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the NHO or ownership by the NHO, among others, do not count (15 U.S.C. §636(j)(10)(J)(ii); 13 C.F.R. §124.110(c))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the CDC or ownership by the CDC, among others, do not count (15 U.S.C. §636(j)(10)(J)(ii); 13 C.F.R. §124.111(c))
"Business"	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1)) Although ANC may be nonprofit, ANC-owned firms must be for-profit to be eligible for 8(a) Program (13 C.F.R. §124.109(a)(3))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))

Category	8(a) Firms Generally	Tribally Owned	ANC-Owned	NHO-Owned	CDC-Owned
"Unconditionally owned and controlled"	At least 51% unconditionally and directly owned by one or more disadvantaged individuals who are U.S. citizens (13 C.F.R. §124.105) Management and daily business operations must be conducted by one or more disadvantaged individuals (13 C.F.R. §124.106)	At least 51% tribally owned (13 C.F.R. §124.109(b)) Management may be conducted by individuals who are not members of the tribe provided that the SBA determines that such management is necessary to assist the business's development, among other things (13 C.F.R. §124.109(c)(4)(B))	At least 51% ANC-owned (13 C.F.R. §124.109(a)(3)) Management may be conducted by individuals who are not Alaska Natives provided that the SBA determines that such management is necessary to assist the business's development, among other things (13 C.F.R. §124.109(c)(4)(B))	At least 51% NHO-owned (13 C.F.R. §124.110(a)) NHO must control the board of directors, but individual who is responsible for day-to-day management need not establish personal social and economic disadvantage (13 C.F.R. §124.110(d))	At least 51% CDC-owned (13 C.F.R. §124.111(a)) Management and daily business operations to be conducted by individuals having managerial experience of an extent and complexity needed to run the firm (13 C.F.R. §124.111(b))
"Socially disadvantaged individual"	Members of designated groups presumed to be socially disadvantaged; other individuals may prove personal disadvantage by a preponderance of the evidence (13 C.F.R. §124.103)	Indian tribes presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	ANCs presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	NHOs presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	CDCs presumed to be socially disadvantaged (42 U.S.C. §9815(a)(2))
"Economically disadvantaged individual"	Financial information (e.g., personal income, personal net worth, fair market value of assets) must show diminished financial capital and credit opportunities	Tribe must prove economic disadvantage the first time a tribally owned firm applies to the 8(a) Program; thereafter, a tribe need only prove economic disadvantage at the request of the SBA (13 C.F.R. §124.109(b)(2))	Deemed to be economically disadvantaged (43 U.S.C. §1626(e); 13 C.F.R. §124.109(a)(2))	NHO must prove economic disadvantage the first time a NHO owned firm applies to the 8(a) Program; thereafter, a NHO need only prove economic disadvantage at the request	CDCs presumed to be economically disadvantaged (42 U.S.C. §9815(a)(2))

Category	8(a) Firms Generally	Tribally Owned	ANC-Owned	NHO-Owned	CDC-Owned
	(13 C.F.R. §124.104)			of the SBA (13 C.F.R. §124.110(c)	
"Good character"	Criminal conduct or violations of SBA regulations may result in denial of participation; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a))	Criminal conduct or violations of SBA regulations may result in denial of participation; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirement applies only to officers, directors, and shareholders owning more than a 20% interest in the business, not to all members of the tribe (13 C.F.R. §124.109(c)(7)(B)(ii))	Criminal conduct or violations of SBA regulations may result in denial of participation; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirement applies only to officers, directors, and shareholders owning more than a 20% interest in the business, not to all ANC shareholders (13 C.F.R. §124.109(c)(7)(B)(ii))	Criminal conduct or violations of SBA regulations may result in denial of participation; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Regulations do not address to whom requirements apply[a]	Criminal conduct or violations of SBA regulations may result in denial of participation; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirements apply to the firm and "all its principals" (13 C.F.R. §124.111(g))
"Demonstrated potential for success"	Firm must generally have been in business in primary industry for at least two full years prior to date of application to 8(a) Program unless SBA grants a waiver; waiver based on 5 conditions[b] (13 C.F.R. §124.107)	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage the firm must have substantial experience, and firm must have had successful performance and adequate capital; or Tribe must have made written commitment to support the firm and have the	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage the firm must have substantial experience, and firm must have had successful performance and adequate capital; or ANC must have made written commitment to support the firm and have	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage the firm must have substantial experience, and firm must have had successful performance and adequate capital; or NHO must have made	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage the firm must have substantial experience, and firm must have had successful performance and adequate capital; or CDC must have made written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.111 (f)(1)-(3)

Category	8(a) Firms Generally	Tribally Owned	ANC-Owned	NHO-Owned	CDC-Owned
		financial ability to do so (13 C.F.R. §124.109(c)(6)(i)-(iii)	the financial ability to do so (13 C.F.R. §124.109(c)(6)(i)-(iii)	written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.110 (g)(1)-(3)	
Sole-source awards	With contracts valued at over $4 million ($7 million for manufacturing contracts), sole-source awards permissible only if there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))	Can be made with contracts valued at over $4 million ($7 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (15 U.S.C. §637(a)(1)(D)(i)-(ii); 48 C.F.R. §19.805-1(b)(1)-(2))	Can be made with contracts valued at over $4 million ($7 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (15 U.S.C. §637(a)(1)(D)(i)-(ii); 48 C.F.R. §19.805-1(b)(1)-(2))	Can be made with Department of Defense contracts valued at over $4 million ($7 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §219.805-1(b)(2)(A)-(B)). Otherwise cannot be made unless there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))	With contracts valued at over $4 million ($7 million for manufacturing contracts), sole-source awards permissible only if there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))
Inability to protest eligibility for award	Firm's eligibility for award cannot be challenged	Firm's eligibility for award cannot be challenged or protested as part	Firm's eligibility for award cannot be challenged or	Firm's eligibility for award cannot be challenged	Firm's eligibility for award cannot be challenged or protested as part

Category	8(a) Firms Generally	Tribally Owned	ANC-Owned	NHO-Owned	CDC-Owned
	or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))
Maximum of nine years in the 8(a) Program	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)
One-time eligibility for 8(a) Program	Applies to both disadvantaged owners and firms (13 C.F.R. §124.108(b))	Applies only to tribally owned firms, not tribes (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to ANC-owned firms, not ANCs (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to NHO-owned firms, not NHOs (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to CDC-owned firms, not CDCs (15 U.S.C. §636(j)(11)(B)-(C))
Limits on the amount of 8(a) contracts that a firm may receive	No sole-source awards possible once the firm has received combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13	Can make sole-source awards even when a firm has received combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Can make sole-source awards even when a firm has combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Can make sole-source awards even when a firm has combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 not explicitly addressed in regulation Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))

Category	8(a) Firms Generally	Tribally Owned	ANC-Owned	NHO-Owned	CDC-Owned
	C.F.R. §124.509(b))				

Source: Congressional Research Service, based on 8(a) Program statutory and regulatory requirements.

a. The rules governing NHO- or CDC-owned firms do not address this issue, and although the general rules apply where no "special rules" exist, it seems unlikely that NHO- or CDC-owned firms are treated differently than tribally or ANC-owned firms in this regard.

b. These criteria include (1) the management experience of the disadvantaged individual(s) upon whom eligibility is based; (2) the business's technical experience; (3) the firm's capital; (4) the firm's performance record on prior federal or other contracts in its primary field of operations; and (5) whether the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform contracts under Section 8(a).

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