

8(a) Business Development Program Regulations

Revised Rules effective March 14 2011

Resources

- Revisions published February 11, 2011
- Federal Register 76 FR 8222
 - Link to Federal Register
<http://www.gpo.gov/fdsys/pkg/FR-2011-02-11/pdf/2011-2581.pdf>
- SBA Webpage -
<http://www.sba.gov/content/revise-8a-regulations>
- SBA 8(a) Compliance Guide
 - [http://www.sba.gov/sites/default/files/8\(a\)%20Compliance%20Guide.pdf](http://www.sba.gov/sites/default/files/8(a)%20Compliance%20Guide.pdf)

When do the changes take effect?

- Majority of the changes became effective **on March 14, 2011**
 - FOR:*
 - ▶ All current Participants in the 8(a) BD program
 - ▶ All PENDING 8(a) applications* (EXCEPT for apps in-house before Feb 11; firm request before 3/14 – *for INCOME only*)
 - ▶ All 8(a) procurement requirements accepted by SBA on or after March 14, 2011.
 - ▶ All solicitations issued and all certifications as to size made after March 14, 2011.

When do the changes take effect?

- Majority of the changes took effect **on March 14, 2011**
EXCEPT:
- Do not apply to any 8(a) BD appeals pending before SBA's Office of Hearings and Appeals.
- Reporting Requirements for Native Owned firms (13 CFR 124.604) apply as of September 9, 2011.

What changes were made?

- Technical changes
- Substantive changes
- Mirror existing or new legislation
- Reduce potential waste, fraud and abuse
- Ensure program benefits flow to intended beneficiaries.

Highlights of Substantive Changes

- Completion of Program Term
- Size for Primary NAICS Code
- Change of Primary NAICS Code
- Economic Disadvantage
- Excessive Withdrawals
- Suspension for Call Ups to Active Duty
- Bona Fide Place of Business
- Joint Venture Requirements
- Mentor – Protégé Program
- Fees

Completion of Program Term

A concern may leave the program by:

- Expiration of the program term (Exits after nine years)
- Voluntary withdrawal or voluntary early graduation
- Graduation (§ 124.302)
- Early graduation (§§ 124.302 and 124.304)
- Termination (§§ 124.303 and 124.304)

Completion of Program Term

- Program term of nine years **begins** on date of SBA's approval letter certifying the concern's admission to the program
- Participant must maintain its program eligibility during its tenure in the program
- Must inform SBA of any changes that would adversely affect its program eligibility

Size for Primary NAICS Code

- Must generally remain small . . . *but*
- SBA may graduate a Participant prior to the expiration of its program term **if firm does not remain small**
 - as adjusted, for three successive program years

Early Graduation and Size

- Is (early) graduation required where firm exceeds its primary NAICS?
 - NO– unfair to graduate a firm that has **one** very successful program year that might not be repeated
 - NO - but exceeding the primary NAICS **might** be an indication that firm **may** no longer need the business development assistance the 8(a) BD program offers

Early Graduation and Size

- Early graduation is not warranted where firm exceeds its primary NAICS AND
 - Firm can demonstrate that primary industry is changing
 - Must be a related *secondary* NAICS code
 - Must determine primary industry, using Part 121 (13 CFR 121.107)
 - Business Plan indicates firm's growth & development
 - Must show that *secondary* NAICS code, and
 - Must contain specific targets, objectives, and goals in that new industry/new primary NAICS
 - Firm can demonstrate by clear evidence that the majority of its total revenues during a **three-year** period have *evolved* from one NAICS code to another

How to Change in Primary NAICS Code?

- A Participant may request the change
- Must file a request with its servicing SBA district office.
- SBA will grant such a request where the Participant can demonstrate that the majority of its total revenues during a three-year period have evolved from one NAICS code to another.
- If granted, business plan must reflect the change

How to Change in Primary NAICS Code?

- SBA will determine primary industry, using Size Regulations - Part 121 (13 CFR 121.107), considering the following factors:
 - Distribution of receipts (tax returns)
 - Distribution of employees
 - Costs of doing business in different industries
 - Distribution of contract awards
 - Distributions of assets

How to Change in Primary NAICS Code? – Majority of Total Revenues

- SBA will grant such a request – to change a primary NAICS - where
 - the Participant can demonstrate that the majority of its total revenues during a *three-year* period have evolved from one NAICS code to another

How to Change in Primary NAICS Code? – Majority of Total Revenues

- SBA will grant such a request – to change a primary NAICS - where the Participant can demonstrate that the majority of its total revenues during a *three-year* period have evolved from one NAICS code to another.
 - “Majority of its total revenues” means
 - NAICS code accounting for
 - the largest amount of all the firm’s revenues
 - from whatever source

Majority of Total Revenues

- Majority of Total Revenues means
 - NAICS code accounting for
 - the largest amount of all the firm's revenues
 - from whatever source
- NOT necessarily 51% of revenues . . .
 - If firm performs work only in two NAICS codes, then
 - **51% of revenues** must come from the new primary industry

Majority of Total Revenues

- Majority of Total Revenues means
 - NAICS code accounting for
 - the largest amount of all the firm's revenues
 - from whatever source
- NOT necessarily 51% of revenues . . .
- If firm performs work in more than two NAICS codes, then
 - **the most dollars** (must come from the new primary industry)

Economic Disadvantage

- SBA will examine
 - income for the past *three years*
 - personal net worth
 - fair market value of all assets
 - spouse's financial condition, *in certain circumstances*

Econ Disadv for Married Individuals

- Must submit separate financial information for his or her spouse, unless legally separated.

Econ Disadv for Married Individuals

- SBA does not take into consideration community property laws when determining economic disadvantage (but still does for ownership)

Econ Disadv for Married Individuals

- SBA will consider a spouse's financial situation in determining an individual's access to credit and capital where the spouse
 - has a role in the business (e.g., an officer, employee or director) or
 - has lent money to, provided credit support to, or guaranteed a loan of the business.

Economic Disadvantage

- Objective criteria to determine **economic disadvantage**
- Applicants must demonstrate economic disadvantage;
 - **Adjusted Net Worth** must not exceed \$250,000 for initial eligibility or \$750,000 for continuing eligibility.
 - **Personal Income** must not exceed \$250,000 (averaged over three years) for initial eligibility or \$350,000 for continuing eligibility.
 - **Total Assets** must not exceed \$4 million for initial eligibility and \$6 million for continued eligibility (allows for growth during the 9 year term).

Individual Retirement Accounts

IRA Accounts –

- excluded from net worth (adjusted like business equity and home equity) - *in certain circumstances*
- not counted as an asset – *in certain circumstances*

Individual Retirement Accounts

- **IRA Accounts – Assets & Net Worth**
- If unavailable until retirement age without a significant penalty will not be considered in determining an individual's net worth
- Individual must provide information about the terms and restrictions of the account.
- Certify that the retirement account is legitimate.

Individual Retirement Accounts

- **IRA Accounts – Assets & Net Worth**
 - If can be accessed immediately and no penalty, **count it!**
(keep as an asset and include in net worth)
 - If accessed (with penalty or not), and invested in firm **do NOT count it!**
(exclude from net worth, like business equity but is no longer an asset)

Subchapter S Corporations, LLCs & Partnerships

- Income received will be excluded where evidence provided to show
 - income was reinvested in the firm or
 - used to pay firm taxes
- Losses from the S corporation (or other pass throughs like LLC or partnership) are losses to the company only,
 - not losses to the individual

Excessive Withdrawals

- New definition for withdrawal–
- Officers' salaries generally not considered withdrawals
SBA will count those salaries as withdrawals where SBA believes that a firm is attempting to circumvent the excessive withdrawal limitations through the payment of officers' salaries

A large salary to a non-disadvantaged individual will be treated as an excessive withdrawal.

Excessive Withdrawals

- New definition for withdrawal–
 - Includes, but is not limited to, the following:
 - cash dividends;
 - distributions in excess of amounts needed to pay S Corporation, LLC or partnership taxes;
 - cash and property withdrawals;
 - payments to immediate family members not employed by the Participant;
 - bonuses to officers;
 - investments on behalf of an owner

Excessive Withdrawals

- SBA will look at
 - **totality of the circumstances**

in determining whether to include any specific amount listed as a withdrawal

Excessive Withdrawals

- The withdrawal amounts will be in the aggregate and are as follows:
 - Firms with sales up to \$1M, \$250,000
 - Firms with sales between \$1M and \$2M, \$300,000
 - Firms with sales exceeding \$2M, \$400,000

Excessive Withdrawals

- Limits on withdrawals do not apply to tribes, ANCs, NHOs, CDCs where
 - withdrawal is made for the benefit of the tribe/ANC/NHO/CDC or
 - benefit of the native or shareholder community
- Applies to withdrawals that do not benefit the relevant entity or community.
- A large salary to a non-disadvantaged individual will be treated as an excessive withdrawal.

New Suspension Rule

- If the disadvantaged individual owner(s) of the 8(a) firm called to **active military status**
 - SBA will no longer terminate the firm

Firm may elect to

- be suspended from program participation or
- continue participation if another disadvantaged individual(s) can control to control the firm

New Suspension Rule

- The length of suspension time is added to program term when individual returns to control the firm.
- If one or more other disadvantaged individuals can continue to control the firm in absence, the firm may elect to continue to operate as an 8(a) firm.

Bona Fide Place of Business

- May have a bona fide places of business in more than one location
- SBA determines if firm can establish a bona fide place of business in a particular geographic location

Bona Fide Place of Business

- A Participant must submit a request for a business determination to the SBA DO servicing the firm
- SBA district office (DO) serving the geographic area of that location must determine if that location in fact qualifies
- For processing, forward request from the servicing DO to the SBA DO serving the geographic area of the particular location

Bona Fide Place of Business

- The effective date is the date that the evidence (paperwork) shows that the business in fact **regularly maintained its business** at the new geographic location.
- In order to be eligible to submit an offer for a 8(a) procurement limited to a specific geographic area, the Participant must receive a determination from SBA **prior to submitting its offer** for the procurement from SBA.

Joint Ventures

- Tightens requirements for joint ventures (JV) so that
 - non-disadvantaged firms do not unduly benefit from the 8(a) BD program
- JV agreement may be informal or formal (separate business structure) but
 - Must be in writing
- Can be unpopulated or populated (own separate employees) and
 - Different rules for each.
- Change from no more than 3 offers to **contracts** over **2 year** period without
 - a finding of general affiliation
- Same two entities may form additional JVs and each may be awarded 3 contracts over 2 years

Joint Ventures

- **8(a) BD program**
 - **Project Manager:**
 - **Unpopulated** (or populated only with administrative personnel) - an employee of 8(a) managing venturer must be project manager
 - **Populated** - performance of the contract is controlled by the 8(a) managing venture

Joint Ventures

- **8(a) BD Program**
 - **Performance of Work**
 - 8(a) partner to the JV must perform at least **40%** of the work performed by the JV (includes all work done by non-8(a) partner and any of its affiliates at **any subcontracting tier**)
 - **Unpopulated** (or populated only with administrative personnel) - the amount of work by all partners will be **aggregated**
 - **Populated** - the non-8(a) JV partner, or any of its affiliates, **may not act subcontractor** to JV or any subcontractor of the JV

Reporting on Performance of Work Requirements

- Annual Review :
 - Participant must demonstrate how it is meeting the performance of work requirements for each 8(a) contract that is performing as a JV
- 8(a) Contract:
 - At the completion of every 8(a) contract awarded to a JV, the Participant must explain how Performance of Work Requirements were met

Mentor Protégé Program

- **Non-profits** can be Mentors
- Mentor can have **up to 3 protégés** at one time
- Protégé can have **second Mentor**, corresponding to an unrelated, secondary NAICS code
- A firm **cannot be both** a Protégé and a Mentor at the same time
- Assistance provided by the Mentor **must** be tied to the Protégé's SBA-approved business plan
- Mentor/Protégé Agreement must be approved by SBA **before** the firms can submit a joint venture offer on a procurement as a small business
- In order to receive the **exclusion from affiliation** on any non-8(a) contracts, the agreement **must comply** with the 8(a) JV requirements (other than SBA approval).
- SBA approved Mentor/Protégé joint ventures are **small** for federal **subcontracts** (DOE)
- SBA **prohibited** from approving a new Mentor/Protégé relationship **within six months** of the end of an 8(a) Participant's program term.
- Benefits derived from Mentor/Protégé relationship end once the protégé leaves the 8(a) BD program
- Specific **reconsideration process** when a Mentor/Protégé Agreement is declined

Failure to Provide Assistance

- Consequences if Mentor does not provide agreed to assistance
- Mentor is notified and provided an opportunity to respond
- SBA may terminate the Mentor/Protégé Agreement
- Mentor is ineligible to participate for 2 years
- SBA may recommend a stop work order for each contract the Mentor and Protégé are performing as a JV and where they have received the exclusion from affiliation
- SBA may authorize substitution of the protégé firm for the JV
- Failure to provide the agreed-upon assistance may constitute grounds for Government-wide suspension or debarment

Fees for Applicant & Participant Representatives

- The **compensation** received by any packager, agent or representative of any 8(a) applicant or Participant for assisting in obtaining certification, 8(a) contracts or other assistance **must be reasonable** in light of services provided.
- The fee charged **cannot be** a percentage of gross contract value.
- **SBA may suspend** a packager, agent or representative from assisting 8(a) applicants or Participants.

Additional Changes

- Disadvantaged individual must reside in the U.S.
- Annual Financial Statement Submittal
 - Under \$2 Mil, in-house financial statements are sufficient
 - \$2 Mil to \$10 Mil reviewed statements are required
 - >\$10 Mil require audited statements
- More than one family member may participate in the 8(a) program at the same time.

QUESTIONS

- Who to contact with additional questions?
- Questions may be emailed to 8aBD2@sba.gov