U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

July 13, 2026

VIA ELECTRONIC SUBMISSION

Mr. Ryan Lambert
Associate Administrator
Government Contracting and Business Development
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

Re: Reforms to Remove SBA's 8(a) Program's Rebuttable Presumption of Social Disadvantage for Individually Owned Firms Only; Reforms Do Not Impact Entity-Owned Firms; RIN 3245-AI75

Dear Associate Administrator Lambert:

The Office of Advocacy (Advocacy) submits these comments in response to the U.S. Small Business Administration's (SBA) proposed rule, "*Reforms To Remove SBA's 8(a) Program's Rebuttable Presumption of Social Disadvantage for Individually Owned Firms Only; Reforms Do Not Impact Entity -Owned Firms*," published in the Federal Register on June 11, 2026.[1] The proposal would amend 13 C.F.R. § 124.103 to remove the rebuttable presumption of social disadvantage for certain designated groups and adopt a new standard and evidentiary framework for establishing social disadvantage for individuals seeking participation in the Section 8(a) Business Development Program ("8(a) BD program").[2]

Advocacy appreciates the opportunity to comment on this proposed rule and supports the SBA's efforts to ensure that the 8(a) BD program remains constitutionally sound, legally durable, and accessible to eligible small businesses.

I. Background

A. The Office of Advocacy

[1] 91 Fed. Reg. 35,433 (proposed June 11, 2026).
[2] *Id*.

Congress established the Office of Advocacy in 1976 under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is a voice within the federal government that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[4] If a rule is not expected to have a significant economic impact on a substantial number of small entities, agencies may certify it as such and submit a statement of the factual basis for such a determination that adequately supports its certification.[5]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[6]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[7] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.[8]

II. Statutory and Regulatory Background

In 1953, Congress enacted the Small Business Act with the intention to "aid, counsel, assist, and protect" small businesses, to ensure a "fair proportion" of federal contracts go to small businesses, and to preserve the competitive free enterprise system.[9] The Small Business Act established the Section 8(a) BD program, which creates contracting preferences for small business concerns owned and controlled by "socially and economically disadvantaged" individuals.

To be eligible to participate in the 8(a) BD program, the Small Business Act requires that a small business concern be at least 51 percent owned by:

(1) one or more socially and economically disadvantaged individuals,

[3] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[4] 5 U.S.C. § 603.
[5] *Id.* § 605(b).
[6] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[7] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[8] *Id.*
[9] 15 U.S.C. § 631(a).

(2) an economically disadvantaged Indian tribe (or a wholly owned business entity of such a tribe), or
(3) an economically disadvantaged Native Hawaiian Organization.[10]

Historically, SBA's regulations included a rebuttable presumption that individuals belonging to certain designated racial and ethnic groups were socially disadvantaged for purposes of individual 8(a) BD program eligibility.[11] That presumption could be rebutted based on "credible evidence to the contrary."[12]

The SBA has now proposed to amend those regulations to remove that presumption and revise the standards for demonstrating social disadvantage pursuant to federal case law. Of note, the proposed rule applies to individually owned and controlled small businesses, not to entity-owned program participants such as those owned by tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations.

III. Legal Developments and the Proposed Rule: Aligning the 8(a) BD Program with *Ultima*

On July 19, 2023, the U.S. District Court for the Eastern District of Tennessee issued its opinion and order in *Ultima Services Corporation v. U.S. Department of Agriculture et al.*[13] At issue was whether, under the Fifth Amendment's guarantee of equal protection, the Department of Agriculture and SBA could use a "rebuttable presumption" of social disadvantage for certain minority groups to qualify them for inclusion in a federal program that awards government contracts on a preferred basis to businesses owned by individuals in those minority groups.

The District Court held that the use of the rebuttable presumption of social disadvantage in administering the 8(a) BD program violated the equal protection clause of the U.S. Constitution and the Court enjoined the SBA from using the presumption.[14] The court concluded that the presumption did not survive strict scrutiny, the highest standard of judicial review used by courts to evaluate the constitutionality of government actions. The court relied, in part, on the Supreme Court's decision in *Students for Fair Admissions v. Harvard,*[15] and directed that the SBA cease using the race-based and ethnicity-based presumption in implementing the 8(a) BD program.

The proposed rule would amend SBA's regulations to remove the rebuttable presumption of social disadvantage for individually owned firms in the 8(a) BD Program, conforming the program to align with the *Ultima* decision. In its place, the SBA proposes a uniform standard under which any U.S. citizen applicant must demonstrate, based on specific evidence, that a governmental or private entity in the United States discriminated against, or favored others over,

[10] 15 U.S.C. § 637(a)(4(A).
[11] 13 C.F.R. § 124.103.
[12] 13 C.F.R. 124.103(b)(3).
[13] *See* Ultima Servs. Corp. v. United States Dep't of Agric., 683 F. Supp. 3d 745, 774 (E.D.Tenn. 2023).
[14] *Id*.
[15] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 143 S. Ct. 2141, 2162 (2023).

a racial, ethnic, or cultural group of which the individual is a member, and that this conduct caused loss of access to diminished opportunities relating to economic advancement.

By eliminating the prior race-based and ethnicity-based presumption and replacing it with a fact-specific showing of discrimination, the proposed rule directly responds to the *Ultima* injunction prohibiting use of the rebuttable presumption in administering the 8(a) BD program. At the same time, it preserves the statutory framework of the 8(a) BD program by maintaining a pathway for socially and economically disadvantaged individuals to participate, consistent with 15 U.S.C. 637(a) and the existing economic disadvantage standards in 13 C.F.R. 124.104.

Advocacy understands that, prior to *Ultima*, the SBA relied upon the rebuttable presumption of social disadvantage in 13 C.F.R. 124.103(b) for members of certain designated groups, which the court has now found inconsistent with constitutional requirements. Advocacy understands the SBA is appropriately recalibrating the 8(a) BD program to comply with the court's decision by proposing a race-neutral, evidence-based standard for social disadvantage, while keeping in place the broader statutory and regulatory structure that Congress established for the 8(a) BD Program.

IV. Advocacy's Support for the SBA's Conformity Efforts and Continuity of the 8(a) Program

Advocacy's support for this proposed rule rests on the principle that the agency must follow the law, including both the Small Business Act and binding court decisions, and that the 8(a) BD Program must be administered in a manner that withstands constitutional scrutiny. The proposed rule reflects a conscientious effort by the SBA to reconcile its longstanding mission to assist socially and economically disadvantaged small businesses with the court's decision in *Ultima*.

Advocacy also recognizes that present uncertainty surrounding social disadvantage standards, including the interim disruption following *Ultima*, has posed operational and planning challenges for current and prospective 8(a) participants, federal contracting agencies, and small business advocates. Advocacy strongly supports the swift finalization of a legally durable rule so that the 8(a) BD Program can continue operating without further interruptions, delays, or uncertainty for small entities that rely on the program.

In Advocacy's view, the proposed individualized standard for social disadvantage, if implemented carefully and administered consistently, offers a path for the agency to keep the 8(a) BD program up and running, respond directly to *Ultima*, and avoid future litigation risk stemming from race-based presumptions. This outcome serves both the statutory purpose of fostering business development for disadvantaged small businesses and the broader public in stable, predictable federal procurement opportunities for those firms.

V. Additional Considerations

As the SBA finalizes this proposed rule, Advocacy offers the following recommendations:

- Provide clear, detailed guidance and examples illustrating the types of evidence that will satisfy the revised social disadvantage standard, allowing small businesses to understand and meet the new requirements without undue burden.

- Ensure that any changes to application processing, screening, and review are implemented in a timely manner that minimizes gaps or delays in admitting eligible firms into the 8(a) BD program.

- Monitor and report on the effects of the new standard on application outcomes and participation rates, consistent with existing statutory and regulatory reporting responsibilities, so that Congress, SBA, and stakeholders can evaluate whether the program continues to reach socially and economically disadvantaged small businesses as envisioned in 15 U.S.C. 637(a).

VI. Conclusion

The Office of Advocacy supports the SBA's proposed rule aligning constitutional principles with the *Ultima* injunction, while preserving and stabilizing the 8(a) BD Program for the small businesses that depend on it. We look forward to continued engagement with SBA as it implements these reforms and stand ready to assist in ensuring that the final rule both complies with the law and sustains robust opportunities for socially and economically disadvantaged small business concerns.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel John Vatian at (202) 996-5299 or John.Vatian@sba.gov.

Sincerely,

/s/

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Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

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Copy to: Mr. Mark Paoletta, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget