# SBA Makes First Major Revision to 8(a) Program In a Decade

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The Small Business Administration has finalized the most comprehensive changes to its 8(a) small and disadvantaged business contacting program in more than a decade, with a sharp focus on reforming and improving the transparency of Alaska native corporations.

The long-awaited final rules, published Friday in the *Federal Register*, closely mirror -- except for minor technical changes -- the proposed rules offered by SBA in October 2009.

The lengthy final rule, which takes effect on March 14, attempts to tackle a host of 8(a) concerns, from the threshold to enter and remain in the program to tightening the rules for joint ventures and mentor-protégé relationships.

"SBA has learned through experience that certain of its rules governing the 8(a) [Business Development] program are too restrictive and serve to unduly preclude firms from being admitted to the program," the rule states. "In other cases, SBA determined that a rule is too expansive or indefinite and sought to restrict or clarify those rules."

The agency conducted public meetings in 10 cities and consulted with tribes in two others. SBA received more than 230 comment letters.

"Through public meetings held in cities throughout the country, SBA gained valuable input from members of the small business community on ways to strengthen the program to provide the best opportunities for eligible firms, while also stepping up efforts to combat waste, fraud and abuse," said SBA Administrator Karen Mills.

Arguably the biggest change affects ANCs, controversial 8(a) subentities that can win sole-source contracts of any size. For the first time, firms owned by ANCs or by Indian tribes, Native Hawaiian organizations and community development corporations will be required to report the financial benefits flowing back to their communities. Several recent news reports and congressional investigations have questioned whether the profits from ANCs are reaching disadvantaged Native Alaskans.

Each firm now will be required to submit information relating to their funding of cultural programs, employment assistance, jobs, scholarships, internships and subsistence activities, SBA said. In a change from the proposed rule, only the parent company, rather than the individual businesses or subsidiaries, will be required to report. Also, the agency delayed implementation of this provision for six months to allow further meetings with the tribal and ANC community, said John Klein, SBA's acting director of government contracting and assistant general counsel for procurement law.

Devon E. Hewitt, a partner in the Washington law firm of Piliero Mazza, said the change recognizes the intense scrutiny ANCs are facing from Congress and watchdogs. "The question is whether they have done enough," Hewitt said.

But some lawmakers want to go further in reforming the ANC program. On Thursday, Rep. Bennie Thompson, D-Miss., ranking member of the House Homeland Security Committee, introduced a bill that would put ANCs on equal footing with all other small businesses operating in the 8(a) program. The bill is a companion to legislation previously introduced by Sen. Claire McCaskill, D-Mo.

"All too often, small businesses are crowded out of opportunities by Alaska native corporations that receive uncapped, no-bid contracts under a special provision of the 8(a) program," Thompson said. "This bill will assure that ANCs cannot continue in a privileged status that both protects them from legitimate competition from other businesses and fails to return a fair share of profits to Native Alaskan shareholders."

The SBA regulations make other attempts to regulate the behavior of ANCs. Firms graduating from the 8(a) program no longer will be allowed to hand off contracts to a new subsidiary owned by the same ANC. "There is a perception that these contracts are being passed from one firm to another," Klein said.

Several ANCs that have proposed changes to the 8(a) program applauded the rules change. "The rule-making process has been long and difficult for the Alaska native community," said Rex Rock Sr., president and chief executive officer of Arctic Slope Regional Corporation. "The SBA struck a meaningful balance by protecting government and taxpayer interests while continuing to provide economic opportunities for disadvantaged businesses."

The final rule also makes several significant changes to the rules guiding joint ventures, which are created when a small business partners with a non-8(a) firm, typically a larger business. These joint ventures are considered small businesses eligible to receive high-value contracts without competition.

The rule attempts to assure that the nondisadvantaged firm does not unduly benefit from the program. The 8(a) partner of the joint venture must now perform at least 40 percent of the work, including those awarded through a mentor-protégé agreement. The previous statutory language required only that the small business perform a "significant portion" of the work, Hewitt said.

Joint ventures awarded to an 8(a) firm also will not be allowed to win more than three contracts during a two-year period, and these entities cannot subcontract work to a non-8(a) joint venture partner. Plus, mentors who do not provide assistance to their protégés could face consequences ranging from stop-work orders to debarment.

Other proposed changes would clarify the size, income and familial determinations needed to be eligible for the 8(a) program, including those:

- Excluding the individual retirement accounts from the strict net worth calculations that are used to determine eligibility for the program;
- Raising the adjusted gross income to enter into the program from $200,000 to $250,000 (the total value of the participant's assets needed to enter the program was increased from $3 million to $4 million);
- Increasing the adjusted gross income for continued eligibility for the program from $300,000 to $350,000 (the asset level was bumped from $4 million to $6 million);
- Allowing immediate family members of a current or former program participant to own an 8(a) firm if they are qualified to run the business and are judged not to be a front for their family member's company;
- Requiring that a firm's size status remain small for its primary industry code during its participation in the 8(a) program;
- Limiting the type and amount of fees an agent or representative can charge for assisting an 8(a) firm (the rule prohibits unreasonable fees as well as arrangements in which the fees are a percentage of the contract award or revenue); and
- Allowing owners of 8(a) firms called to active military status to elect to be temporarily suspended rather than lose any of their nine-year term in the program.