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Significant Changes for Small Business Administration 8(a) Program

By **Stephanie L. Chandler** and **David Garcia**

On February 11, 2011, the U.S. Small Business Administration ("SBA") released its Final Rule containing changes to the regulations governing the 8(a) Small Business Development Program ("8(a) program"). The 8(a) program provides assistance to socially and economically disadvantaged business owners in the form of business development services, including the opportunity to receive federal contracts on a sole-source or limited competition basis. The revised rules, which went into effect on March 14, 2011, contain many significant changes that apply both to businesses already in the 8(a) program and to those with pending applications to enter the 8(a) program. In addition to many substantive and technical changes, the SBA has provided better clarification on the criteria necessary to qualify for the 8(a) program.

Summary of Key Changes

Determination of Economic Disadvantage: The revised rules add clarity to the factors that determine whether an individual is "economically disadvantaged." Specifically, a rebuttable presumption against a new applicant now arises if the applicant's average Adjusted Gross Income ("AGI") for the 3 years preceding the application exceeds \$250,000. For continued eligibility after being admitted to the 8(a) program, the individual average AGI limit for the prior three-year period increases to \$350,000. In addition, the SBA has added clarity on the issue of total asset value as a criteria for eligibility. Where the former rules allowed for the general consideration of the fair market value of an individual's total assets in determining eligibility, the revised rules state specific maximum allowable thresholds for the value of total assets: \$4 million for new applicants and \$6 million for those seeking continued eligibility.

Participant Size: The revised rules state that 8(a) participants must retain their status as *small* per the SBA's size guidelines for the applicable primary North American Industry Classification System ("NAICS") code in order to continue receiving benefits. Under the new rules however, 8(a) program participants are also granted an option to change their primary industry classification where they can demonstrate to SBA by clear evidence that the majority of their total revenues during a two-year period have evolved from one NAICS code to another.

Joint Ventures Involving an 8(a) Participant: The limitation on JVs being able to bid on three 8(a) contracts over a two-year period has been changed to allow a JV to bid on any number of contracts, but not to accept more than three awards over a two-year period, beginning from the date of the first award.

The SBA has also added clarity to the amount of work an 8(a) program participant partner in a qualifying JV must perform and the amount of profits it must receive. The former rules on the amount of work only required a "significant portion" be done by the 8(a)

participant, but the new rules mandate a minimum of 40% for unpopulated JVs.¹ On the issue of profit, the 51% requirement to the 8(a) participant in a JV has been abolished in favor of a standard by which the profit must be “commensurate with work performed.”

Mentor/Protégé Relationship: The SBA has added mechanisms to ensure positive mentor/protégé relationships under the 8(a) program. Where a mentor fails to provide the agreed upon assistance, the SBA will now be able to recommend stop work orders for all federal contracts the mentor is performing.

Excessive Withdrawals Rule: The limits on the amount of allowable withdrawals a participating company can make have been increased to the following levels: \$250,000 for firms with annual sales up to \$1 million; \$300,000 for firms with annual sales between \$1 million and \$2 million; and \$400,000 for firms with annual sales above \$2 million. Additionally, the SBA has excluded officer salaries from the definition of “withdrawal.”

The foregoing is only a summary of key changes to the 8(a) program rules. We encourage all companies and entrepreneurs who are in the program or may be contemplating an application for admission to the program to review the **SBA's Final Rule** for a complete picture of all the changes involved.

If you have any questions about the impact of any of these new revisions on your business or about your ability to qualify for assistance under the 8(a) program or other minority or women-owned business certifications that may be available, please contact **Stephanie Chandler** at 210.978.7704 or schandler@jw.com, **David Garcia** at 512.236.2391 or dgarcia@jw.com, or any of the **Jackson Walker Corporate & Securities attorneys**. Additionally, if you would like more information regarding potential certifications which may be available to your business, please [click here](#).

¹In an “unpopulated joint venture” each partner company performs work independently as a subcontractor to the joint venture.

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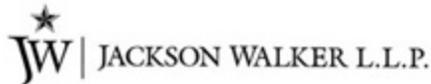
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