Overview of Changes to SBA's Mentor-Protégé, Joint Venture, 8(a) Business Development and Small Business Size Regulations

On July 25, 2016, SBA published its final rule implementing a new mentor-protégé program for small businesses as well as other changes in the regulations regarding joint ventures and the 8(a) Business Development Program. This chart summarizes some of the key changes as compared with the current rule. The rule will become effective on August 24, 2016.

New Mentor-Protégé Program for All Small Businesses

Rule Citation	Current Rule	New Rule
Applications for SBA's Small Business Mentor-Protégé Program		
13 C.F.R. § 125.9	SBA's Associate Administrator for BD (AA/BD) reviews and approves or declines mentor-protégé relationships in the 8(a) BD program.	The 8(a) mentor-protégé program will be separate and distinct from the new small business mentor-protégé program. The final rule makes no changes as to how mentor-protégé agreements are processed for the 8(a) program. Applications for the new small business mentor-protégé program will be administered by a newly created unit within the Office of Business Development, with the ultimate decision-making authority vested in the AA/BD. At least initially, SBA does not intend to utilize "open and closed" enrollment periods, but reserves the right to revisit the concept if the new unit becomes overwhelmed with applications and oversight responsibilities.
Mentors		
13 C.F.R. § 124.520 **13 C.F.R. § 125.9**	The current rules for the 8(a) mentor-protégé program allow non-profit entities to act as mentors, and allow mentors to have up to three (3) protégés. It requires mentors to "posses[s] favorable financial health." There is no current small business mentor protégé program.	Mentors must be for-profit concerns of any size. Mentors are limited to having a <u>total</u> of three (3) protégés at one time. A firm that is a protégé under a mentor-protégé relationship <u>may</u> also concurrently serve as a mentor in a second mentor-protégé relationship, where the firm can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship. Mentors need not demonstrate "good financial condition"; rather, a mentor must only demonstrate that it can fulfill its obligations as specified under the mentor-protégé agreement.

Rule Citation	Current Rule	New Rule
Protégés		
13 C.F.R. § 124.520 **13 C.F.R. § 125.9**	In order to qualify as a protégé for the 8(a) mentor-protégé program, an 8(a) Program Participant must: have a size that is less than half the size standard corresponding to its primary NAICS code; or be in the developmental stage of its 8(a) program participation; or not have received an 8(a) contract. A protégé participating in the 8(a) mentor-protégé program generally will have no more than one mentor at a time. However, a protégé may have two mentors where the two relationships will not compete or otherwise conflict with each other and the protégé demonstrates that the second relationship pertains to an unrelated, secondary NAICS code, or the first mentor does not possess the specific expertise that is the subject of the mentor-protégé agreement with the second mentor.	Protégés must qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code. However, the protégé must have prior experience in the secondary NAICS code and bring more to any potential joint venture with its mentor other than its small business status. The protégé may have up to two mentors where it can demonstrate that the second relationship pertains to an unrelated, secondary NAICS code or the first mentor does not possess the specific expertise that is the subject of the mentor-protégé agreement with the second mentor.
13 C.F.R. § 121.1001(b)(10) **125.9(c)(1)**	There is no formal process by which a firm is certified as a "small" business. Status as a small business is based on a firm's self-certification.	Protégés do not need to undergo a size determination before participating in the program, as the normal size protest procedures act as a sufficient "check" on participants' size certifications. A firm may request a formal size determination in order to verify its eligibility as a protégé firm.
Mentor-Protégé Programs of Other Departments and Agencies		
13 C.F.R. § 125.10	N/A	Mentor-protégé programs established by other agencies (except the Department of Defense) may continue to operate for a one year period after the effective date of the new rule (August 24, 2016). However, the SBA must approve those agency programs in order for them to continue beyond one year.

Rule Citation	Current Rule	New Rule
Benefits of Mentor-Protégé Relationships		
13 C.F.R. § 124.520 **13 C.F.R. § 125.9**	Under the current 8(a) mentor protégé program, a mentor may own an equity interest of up to 40% in the protégé firm in order to raise capital for the protégé firm, and a joint venture between a protégé and its approved mentor is deemed to be a small business concern for any Federal contract or subcontract.	Mentor-protégé joint ventures may qualify as a small business for any federal government contract or subcontract where the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement. During the mentor-protégé relationship, the protégé firm is shielded from a finding of affiliation where a large business mentor owns up to 40% of the protégé. The mentor is <u>not</u> required to divest itself of its ownership interest in a protégé firm once the mentor- protégé relationship ends. However, if a large business mentor does not divest itself of such ownership interest, the former protégé will be found to be ineligible for any small business contract where the mentor's ownership interest causes affiliation between the firms under SBA's size rules.
Written Mentor-Protégé Agreement		
13 C.F.R. § 124.520 **13 C.F.R. § 125.9**	SBA's current mentor-protégé 8(a) program regulation (13 C.F.R. § 124.520) provides that all mentor-protégé agreements must be in writing and must specify what real and substantive development assistance is being provided to the protégé.	The mentor-protégé relationship must be formalized in a written agreement, outlining specifically the benefits intended to be derived by the projected protégé firms. All small businesses, including 8(a) participants, will be limited to having two mentors. A protégé already in other mentor-protégé relationship must show that the assistance being provided under any new mentor-protégé agreement differs from the assistance being provided pursuant to the mentor-protégé agreement already in place. SBA will review a mentor-protégé relationship annually to determine whether to approve its continuation for another year. A protégé can have two three-year mentor-protégé agreements with two different mentors, and will allow each to be extended for a second three years, provided the protégé has received the agreed-upon business development assistance and will continue to receive additional assistance. An 8(a) participant can transfer its 8(a) mentor-protégé relationship to a small business mentor-protégé relationship after it leaves the 8(a) program.

Joint Ventures

Rule Citation	Current Rule	New Rule
Definition of Joint Venture		
13 C.F.R. § 121.103(h)	The current rule states that a joint venture must be "in writing," and "may (but need not) be in the form of a separate legal entity." The current rule also allows a "separate legal entity" joint venture to be unpopulated, to be populated with administrative personnel only, or to be populated with its own separate employees who are intended to perform contracts awarded to the joint venture.	The final rule clarifies that, while joint ventures need not be incorporated or established as a separate LLC, the arrangement and various responsibilities of the parties must be reduced to a written agreement. If the joint venture exists as a formal separate legal entity, it may not be populated with direct labor but may be populated with administrative employees. Existing populated joint ventures may continue to perform contracts that have already been awarded, and may receive awards of any pending proposals. However, after the effective date of the final rule (August 24, 2016), proposals submitted by populated joint ventures will no longer be covered under the affiliation exception – meaning that the joint venturers may be found to be affiliated for that particular contract if they continue to submit proposals under a populated joint venture after August 24th. Joint ventures must also be separately identified in SAM so that awards made to joint ventures can be properly accounted for – the joint venture must register itself in SAM with a separate DUNS number and CAGE number than those of the individual venturers, and the entity type in SAM must be identified as a joint venture, with the individual joint venture partners listed.
HUBZone Joint Ventures		
13 C.F.R. § 126.616	The regulations currently permit a joint venture only between a HUBZone SBC and another HUBZone SBC, and there is no mentor-protégé program for HUBZone firms.	The final rule adopted the proposal for HUBZone SBCs to joint venture with one or more other non-HUBZone SBCs, or with an SBA-approved mentor that is also not a HUBZone SBC. The joint venture itself need not be certified as a qualified HUBZone SBC.
13 C.F.R. § 126.618	The regulations currently permit a joint venture only between a HUBZone SBC and another HUBZone SBC.	Qualified HUBZone SBCs may participate in either the 8(a) or small business mentor-protégé program, provided that such relationships do not conflict with the underlying HUBZone requirements. However, SBA will not consider the employees of the mentor in determining whether the HUBZone SBC meets or continues to meet the 35% HUBZone residency requirement or the principal office requirement, or in determining the size of the applicant or qualified HUBZone SBC for any employee-based size standard.

Rule Citation	Current Rule	New Rule
Joint Venture Certifications and Performance of Work Reports		
13 C.F.R. § 125.8	N/A	The final rule adopted the certification requirements in the Proposed Rule, with slight modifications. Prior to performance of a small business set-aside or reserved contract by a mentor-protégé small business joint venture, the small business partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by each joint venturer, certifying that the joint venture fully complies with the regulatory requirements, and that the parties will perform the contract in compliance with the joint venture agreement and with the regulatory performance of work requirements (i.e., that the small business joint venturer has performed at least 40% of the work done by the joint venture partners). Additionally, upon contract completion, the small business partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by each joint venturer, explaining how and certifying that the performance of work requirements were met for the contract and that the contract was performed in compliance with the joint venture regulatory requirements. Moreover, the government may also consider as grounds for suspension and debarment any joint venture that fails to enter into a joint venture agreement compliant with the regulations, fails to perform the contract in accordance with the joint venture agreement or performance of work requirements, and fails to submit the required certifications to the government.
13 C.F.R. § 125.18	N/A	The final rule adopted the certification requirements in the Proposed Rule, with slight modifications. Prior to performance of a SDVOSB contract as a joint venture, the SDVOSB partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by each joint venturer, certifying that the joint venture fully complies with the regulatory requirements, and that the parties will perform the contract in compliance with the joint venture agreement and with the regulatory performance of work requirements (i.e., that the SDVOSB joint venturer has performed at least 40% of the work done by the joint venture partners). Additionally, upon contract completion, the SDVOSB partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by each joint venturer, explaining how and certifying that the performance of work requirements was met for the contract and that the contract was performed in compliance with the joint venture regulatory requirements. Moreover, the government may also consider as grounds for suspension and debarment any joint venture that fails to enter into a joint venture agreement

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		compliant with the regulations, fails to perform the contract in accordance with the joint venture agreement or performance of work requirements, and fails to submit the required certifications to the government.
13 C.F.R. § 126.616	N/A	The final rule adopted the certification requirements in the Proposed Rule, with slight modifications. Prior to performance of a HUBZone contract as a joint venture, the HUBZone partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by each joint venturer, certifying that the joint venture fully complies with the regulatory requirements, and that the parties will perform the contract in compliance with the joint venture agreement and with the regulatory performance of work requirements (i.e., that the HUBZone joint venturer has performed at least 40% of the work done by the joint venture partners). Additionally, upon contract completion, the HUBZone partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by each joint venturer, explaining how and certifying that the performance of work requirements was met for the contract and that the contract was performed in compliance with the joint venture regulatory requirements. Moreover, the government may also consider as grounds for suspension and debarment any joint venture that fails to enter into a joint venture agreement compliant with the regulations, fails to perform the contract in accordance with the joint venture agreement or performance of work requirements, and fails to submit the required certifications to the government.
13 C.F.R. § 127.506	N/A	The final rule adopted the certification requirements in the Proposed Rule, with slight modifications. Prior to performance of a EDWOSB or WOSB contract as a joint venture, the EDWOSB or WOSB partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by each joint venturer, certifying that the joint venture fully complies with the regulatory requirements, and that the parties will perform the contract in compliance with the joint venture agreement and with the regulatory performance of work requirements (i.e., that the EDWOSB or WOSB joint venturer has performed at least 40% of the work done by the joint venture partners). Additionally, upon contract completion, the EDWOSB or WOSB partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by each joint venturer, explaining how and certifying that the performance of work requirements was met for the contract and that the contract was performed in compliance with the joint venture regulatory requirements.

Rule Citation	Current Rule	New Rule
		Moreover, the government may also consider as grounds for suspension and debarment any joint venture that fails to enter into a joint venture agreement compliant with the regulations, fails to perform the contract in accordance with the joint venture agreement or performance of work requirements, and fails to submit the required certifications to the government.
Tracking Joint Venture Awards		
13 C.F.R. § 121.103(h)	N/A	The final rule clarifies that (1) joint ventures are required to be separately identified in SAM so that awards to joint ventures can be properly accounted for; (2) a joint venture must be identified as a joint venture in SAM, with a separate DUNS number and CAGE number than those of the individual parties to the joint venture; and (3) the entity type in SAM must be identified as a joint venture, and the individual joint venture partners should also be listed.

Changes to the 8(a) Program Rules

Rule Citation	Current Rule	New Rule
Size of 8(a) Joint Venture		
13 C.F.R. § 124.513(b)(4)	As opined by OHA in *Size Appeal of Goel Services, Inc. and Grunley/Goel Joint Venture D LLC*, SBA No. SIZ-5320 (2012), the size of an SBA-approved 8(a) joint venture cannot be protested because SBA had, in effect, determined the joint venture to qualify as small when it approved the joint venture pursuant to § 124.513(e).	The final rule clarifies that SBA's approval of a joint venture agreement does not equate to a formal size determination. Thus, the size status of a joint venture that is the apparent successful offeror for a competitive 8(a) contract may be challenged, despite SBA's approval of the joint venture agreement.
Establishing Social Disadvantage for the 8(a) BD Program		
13 C.F.R. § 124.103(c)	The current rule expressed in several SBA OHA decisions allows an individual to establish social disadvantage despite the record lacking sufficient evidence supporting a discriminatory basis for the alleged misconduct. *See Matter of Tootle Construction, LLC*, SBA No. BDP-420 (2012), *StretegyGen Co.*, SBA No. BDPE-460 (2012).	The final rule clarifies that an individual claiming social disadvantage must present facts and evidence that by themselves establish that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world. Additionally, each instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage. Furthermore, SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse employment action or other perceived adverse action exists and the individual has not presented evidence that would render his or her claim any more likely than the alternative ground.

Rule Citation	Current Rule	New Rule
Substantial Unfair Competitive Advantage Within an Industry Category		
13 C.F.R. § 124.109(c)(2)(iv), 13 C.F.R. § 124.110(b), 13 C.F.R. § 124.111(c)	Pursuant to section 7(j)(10)(J)(ii)(II) of the Small Business Act, 15 U.S.C. § 636(j)(10)(J)(ii)(II), "[i]n determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) [for purposes of 8(a) BD program entry and 8(a) §BD contract award], each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category."	An entity-owned business concern is not subject to the broad exemption to affiliation set forth in 13 CFR part 124 where one or more entity owned firms are found to have obtained, or are likely to obtain, a substantial unfair competitive advantage on a national basis in a particular NAICS code with a particular size standard. SBA will consider a firm's percentage share of the national market and other relevant factors to determine whether a firm is dominant in a specific six-digit NAICS code with a particular size standard. SBA will review Federal Procurement Data System (FPDS) data to compare the firm's share of the industry as compared to overall small business participation in that industry to determine whether there is an unfair competitive advantage. The rule does not contemplate a finding of affiliation where an entity-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.
Management of Tribally-Owned 8(a) Program Participants		
13 C.F.R. § 124.109(c)(4)	Section 7(j)(11)(B)(iii)(II) of the Small Business Act (15 U.S.C. § 636(j)(11)(B)(iii)(II)) provides that individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time, but this limitation did not also appear in SBA's 8(a) BD regulations.	The final rule adds language to § 124.109(c)(4) specifying that the individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time.

Rule Citation	Current Rule	New Rule
Change in Primary Industry Classification		
13 C.F.R. § 124.112(e)	An entity-owned applicant to the 8(a) BD program (i.e., one owned by an Indian tribe, Alaska Native Corporation (ANC), Native Hawaiian Organization (NHO), or Community Development Corporation (CDC)) cannot own more than 49% of another firm which, either at the time of application or within the previous two years, has been participating in the 8(a) BD program under the same primary NAICS code as the applicant. As such, an entity-owned applicant must select a primary business classification (as represented by a six-digit NAICS code) that is different from the primary business classification of any other Participant owned by that same entity. After being certified to participate in the 8(a) BD program, however, there is no current requirement that the newly admitted Participant actually perform most, or any, work in the six digit NAICS code selected as its primary business classification in its application.	This was the most heavily commented on provision of the proposed rule. The final rule provides that where SBA believes that a Participant's revenues for a secondary NAICS code exceed those of its identified primary NAICS code over the Participant's last three completed fiscal years, SBA would notify the Participant of its belief and ask the firm for input as to what its primary NAICS code is. At that point, SBA would be looking for a reasonable explanation as to why the identified primary NAICS code should remain as the Participant's primary NAICS code. If SBA determined that a change in a Participant's primary NAICS code was appropriate and that Participant was an entity-owned firm that could not have two Participants in the program with the same primary NAICS code, the second, newer firm would be permitted to continue to participate in the 8(a) BD program, but not be permitted to receive any additional 8(a) contracts in the six-digit NAICS code that is the primary NAICS code of the other 8(a) Participant.
8(a) BD Program Suspensions		
13 C.F.R. § 124.305	Under the current rule, an 8(a) participant cannot initiate its own suspension from the program for business reasons.	SBA added two additional bases for allowing a Participant to elect to be suspended from 8(a) BD program participation: where the Participant's principal office is located in an area declared a major disaster area or where there is a lapse in Federal appropriations.
Benefits Reporting Requirement		
13 C.F.R. § 124.602	SBA's current regulations require an entity-owned Participant to report benefits as part of its annual review submission.	In order to further clarify SBA's intent and eliminate any doubt that benefits reporting is not in any way tied to continued 8(a) BD eligibility for any entity-owned Program Participant, the final rule changes the timing of benefits reporting from the time of a Participant's annual review submission to the time of a Participant's annual financial statement submission. The regulatory change will continue to require the submission of the data on an annual basis but within 120 days after the close of the concern's fiscal year instead of as part of the annual submission.

Other Changes for Management of Tribally-Owned Small Businesses

Rule Citation	Current Rule	New Rule
Common Administrative Services		
13 C.F.R. § 121.103(b)(2)(ii)	Under the current SBA regulations, business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered to be affiliated with each other "based upon the performance of common administrative services, such as bookkeeping and payroll, so long as adequate payment is provided for those services."	Under the final rule, "common administrative services" include: (1) Bookkeeping; (2) Payroll; (3) Recruiting; (4)Human Resource Support; (5) Cleaning Services; (6) Other duties that are unrelated to contract performance or management and can be reasonably pooled or otherwise performed by the holding company, parent entity, or sister business concern without interfering with control; (7) Record retention not related to a specific contract (e.g., employee time and attendance records); (8) Maintenance of databases for awarded contracts; (9) Monitoring for regulatory compliance; (10) Template development; (11) Assisting accounting with invoice preparation as needed; (12) Efforts at the holding company/parent level to identify possible procurement opportunities for specific subsidiary companies, until the opportunity becomes concrete enough to assign to the subsidiary; and (13) Assistance with preparing the generic part of an offer. "Common administrative services," for purposes of the exception to affiliation, do not include the following, which may only be performed by the offeror for the contract at issue, not by a parent or sister company: (1) Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project; (2) Negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications; (3) Project scheduling; (4) Hiring and firing of employees; (5) Overall responsibility for the day-to-day and overall project and contract completion; (6) Business development after an opportunity is identified; (7) Controlling technical and contract specific portions of preparing an offer; and (8) Controlling employee assignments and the logistics for contract performance.