

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

MEMORANDUM

To: Members, Small Business Committee
From: Nydia M. Velázquez, Chairwoman
Date: September 18, 2019
Re: Full Committee hearing: The Role of the SBA 8(a) Program in Enhancing Economic Opportunities

On Wednesday, September 18, 2019 at 11:30 a.m. in Room 2360 of the Rayburn House Office Building, the Committee on Small Business will hold a hearing entitled, “The Role of the SBA 8(a) Program in Enhancing Economic Opportunities.” The SBA’s 8(a) program was designed as a business development program to help disadvantaged businesses compete in the federal marketplace. The program helps thousands of small businesses start and grow by competing for government contracts and in doing so, assists local communities. Nevertheless, the program has faced several challenges throughout the years. The hearing will examine how the program operates, the benefits to entrepreneurs and communities, and steps Congress can take to improve the effectiveness and oversight of the program.

Witnesses for this hearing include:

- Mr. Ralph C. Thomas III, Executive Director Emeritus & Representative of the National Association of Minority Contractors (NAMC) and Lawyer, Law Offices of Ralph C. Thomas III PLLC, Washington, D.C.
- Ms. Dottie Li, Founder and CEO, TransPacific Communications, Cheverly, MD
- Mr. Clarence McAllister, CEO, Fortis Networks, Phoenix, AZ
- Ms. Rebecca Askew, CEO & General Counsel, Circuit Media LLC, Denver, CO

Background

Minorities are a driving force in the U.S. economy. In 2012, there were 8 million minority-owned small businesses in the United States, contributing \$1.38 trillion in revenue and 7.2 million jobs to the economy.¹ These businesses, which accounted for 29.3% of all firms, were 12% Hispanic-owned, 10% African American-owned, 7% Asian-owned, 1% owned by American Indians and Alaska Natives, and 0.2% owned by Native Hawaiians and other Pacific Islanders.² Minorities have suffered the effects of discriminatory practices in access to affordable credit, housing, and education throughout the nation’s history simply because of their race or ethnicity. Recognizing this, federal programs have been developed to aid racial and ethnic minorities to level the playing field by incentivizing their full participation in the free enterprise system. The ultimate goal of

¹ Small Bus. Admin. Off. of Advoc., *Minority Business Ownership: Data from the 2012 Survey of Business Owners* (Sept. 14, 2016) <https://www.sba.gov/sites/default/files/advocacy/Minority-Owned-Businesses-in-the-US.pdf>.

² *Id.*

which will help America achieve social and economic equality while improving and increasing the economy.

One of the ways the Small Business Act supports minority entrepreneurs and small business owners is by ensuring they can gain access to the federal marketplace through the 8(a) program. The purpose of the program is to promote the business development and competitive viability of small business concerns owned and controlled by socially and economically disadvantaged people. In fiscal year (FY) 2017, Federal agencies awarded \$16.3 billion, or 3.7 percent, of total small business eligible Federal contracting dollars, using 8(a) sole-source and set-aside contracts. As of April 2018, the 8(a) program had 4,903 participants.³ This hearing will provide a broad view of the program and its benefits.

8(a) Program Overview

The Small Business and Capital Ownership Development Program, known as the 8(a) program, is a federal contracting program, which was created in 1978⁴ to give explicit statutory authority to the Small Business Administration (SBA) to focus on minority-owned businesses.⁵ In the 1980s, the program was further expanded to include small businesses owned by four disadvantaged groups: Indian tribes, Alaska Native Corporations (ANCs), Native-Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs).⁶

To qualify for the program, individual small businesses must meet the following requirements:

- Be small,
- Be at least 51 percent unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who:
 - are of good character and;
 - are citizens of and residing in the US,
- Business must demonstrate a potential for success, and
- One-time eligibility only.

³ SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REPORT 18-22, IMPROVEMENTS NEEDED IN SBA'S OVERSIGHT OF 8(A) CONTINUING ELIGIBILITY PROCESSES (SEPT. 2018) [hereinafter SBA OIG 18-22].

⁴ To amend the Small Business Act and the Small Business Investment Act of 1958, P.L. 95-507, 92 Stat. 1757, (October 24, 1978).

⁵ The 8(a) Program, as originally enacted, was not limited to socially and economically disadvantaged businesses. See ROBERT JAY DILGER, CONG. RESEARCH SERV., R44844, SBA'S "8(A) PROGRAM": OVERVIEW, HISTORY AND CURRENT ISSUES (2019) [hereinafter Dilger R44844].

⁶ *Id.* Small businesses owned by any of these groups are able to participate in the Program under slightly different requirement than those presented in this section. Specifics as to how the 8(a) Program works when it comes to these entities will be the focus of a subsequent hearing and corresponding materials.

Additional details of the different eligibility requirements are presented in Table 1:

Table 1: Requirement	Description
Small	Pursuant to the Act, a small business is one that is independently owned and operated, is not dominant in its field of operation and meets the size standard set by the SBA Administrator. ⁷
Unconditionally Owned and Controlled	<p>Unconditional ownership means “not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another.”⁸</p> <p>Ownership also needs to be direct (without an intermediary).⁹</p> <p>In contrast, control includes “strategic policy setting and day to day management and administration of business operations.”¹⁰</p>
Socially Disadvantaged Individual	<p>“Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.”¹¹</p> <p>Individuals that are presumed socially disadvantaged are: African-Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans.¹²</p> <p>If an individual is not a member of one of these groups, then they must show through preponderance of the evidence that they are socially disadvantaged. As part of this evidence, they must show an objective distinguishing feature that has contributed to being socially disadvantaged such as: race, ethnic origin, gender, physical handicap, etc.¹³</p>

⁷ 15 U.S.C. §632(a)(1)- (a)(2)(A).

⁸ 13 CFR §124.105 and §124.3.

⁹ 13 CFR §124.105.

¹⁰ 13 CFR §124.106.

¹¹ 13 CFR §124.103.

¹² *Id.*

¹³ *Id.*

Economically Disadvantaged	<p>Economically disadvantaged individuals are “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.”¹⁴</p> <p>Economic disadvantage is shown by submitting a narrative and personal financial documentation about one’s income, assets, and net worth. These values must fall below regulatory amounts. For example: for initial 8(a) eligibility, net worth must be less than \$250,000 and for continued eligibility, less than \$750,000.¹⁵</p>
Good Character	<p>To determine the good character of an applicant or participant, SBA considers any credible source regarding possible criminal conduct, violations of SBA’s regulations, debarred or suspended concerns or persons, among other matters.¹⁶</p>
Potential for success	<p>Generally, by being in business in its primary business classification for, at least, two years before the date of application.¹⁷</p>
One time eligibility	<p>“Once a concern or individual upon whom eligibility was based has participated in the 8(a) BD program, neither the concerns nor that individual will be eligible again.”¹⁸</p>

How the 8(a) program works and its benefits

Section 8(a) of the Small Business Act allows agencies to contract with the SBA, which in turn subcontracts to an 8(a) firm to provide goods or services, or to perform construction work. Nevertheless, under the program, SBA can, and often, delegates the function of executing contracts to the agencies, allowing them to directly contract with 8(a) firms.¹⁹

Once in the program, 8(a) participants are eligible for numerous benefits, including sole source contracts (contracts awarded without competition) and set asides (in which competition is restricted to a certain pool of contractors). Individually-owned small businesses can receive sole-source contracts of less than \$4 million for goods and services without having to compete (\$7 million for manufacturing).²⁰ Above those thresholds, individually-owned small businesses generally compete for awards, but competition is limited or set aside to 8(a) participants only.²¹

¹⁴ 13 CFR §124.104.

¹⁵ *Id.*

¹⁶ 13 CFR §124.108(a)(1)-(5).

¹⁷ 13 CFR §124.107.

¹⁸ 13 CFR §124.108(b)(1)-(5).

¹⁹ 15 USC §637. *See also* Dilger R44844, *supra*, note 5.

²⁰ 13 CFR §124.506.

²¹ *Id.*

These benefits are further enhanced by the statutory goal of awarding 5% of all prime eligible contracts and subcontracts to small disadvantaged businesses, including 8(a) businesses.²²

Moreover, 8(a) firms are eligible to receive technical and management assistance through the 7(j) program. In particular, they can receive counseling and training in areas such as financing, management, accounting, bookkeeping, marketing and operation of small business concerns; and assistance in the identification of new business opportunities.²³ In FY2018, 6,483 small businesses received 7(j) assistance.²⁴

Finally, the 8(a) program has its own Mentor-Protégé program in which mentors provide business assistance to their 8(a) small business counterparts and facilitate strong relationships among private sector companies. There were 493 active 8(a) mentor-protégé agreements in place as of February 2018.²⁵ Mentors must be approved by the SBA and can be large firms, 8(a) program graduate businesses, or other small businesses. Assistance may include technical and management assistance, financial assistance; subcontracts either from the mentor to the protégé or from the protégé to the mentor, education; and assistance in performing prime contracts through joint venture arrangements.²⁶

Small businesses are able to participate in the 8(a) Program for up to nine years as long as they remain eligible for the program by meeting the eligibility criteria. However, their 8(a) status can be terminated or reduced by early graduation or voluntary withdrawal.²⁷ To ensure that small firms maintain their eligibility, SBA monitors small business through two mechanisms: annual reviews and continuing eligibility reviews. Applications are processed at two central offices with direct assistance provided by Business Opportunity Specialists (BOSs) located in direct offices and while reporting to the Office of Field Operations, they interact regularly with the Office of Business Development. The application process has been flagged by stakeholders as a potential area for improvement.

Challenges in the 8(a) Program

Throughout the program's existence, concerns have been raised by the SBA Office of Inspector General (OIG), the Government Accountability Office (GAO), and participants themselves. The 8(a) program has experienced a participation decline, application and certification challenges, a lack of program oversight, and the need for more technical assistance to graduating firms.

Reduced 8(a) participation and lack of documentation demonstrating eligibility of applicants

²² 15 U.S.C. 644(g).

²³ 13 CFR § 124.702.

²⁴ ROBERT JAY DILGER, CONG. RESEARCH SERV., R41352, SMALL BUSINESS MANAGEMENT AND TECHNICAL ASSISTANCE TRAINING PROGRAMS (2019) [hereinafter Dilger R41352].

²⁵ ROBERT JAY DILGER, CONG. RESEARCH SERV., R41722, SMALL BUSINESS MENTOR-PROTÉGÉ PROGRAMS (2019) [hereinafter Dilger R41722].

²⁶ 13 CFR § 124.520.

²⁷ 13 CFR §124.2.

There has been a steady decrease in the number of small business participating in the program. In 2010 there was 7,000 8(a) participants, yet by 2016, there were only 4,900 8(a) certified firms.²⁸ Thus, SBA made it a priority to increase the number of participants by 5% in FY 2016 and FY 2017. Among the strategies used to achieve this goal was a streamlined application process that was supposed to be less burdensome for applicants.²⁹

However, the results of this streamlined certification process have been unclear. In FY 2015, before implementing the streamlined process, SBA certified 568 small firms. By contrast, SBA certified 911 in FY 2016 and 557 in FY 2017 under the streamlined certification process.³⁰ These lackluster results combined with the expedited applications, has led to questions about the eligibility of certifications. The OIG has argued that “shortening the review process by eliminated documents may erode core safeguards that prevented questionable firms from entering the 8(a) program.”³¹

Similarly, regarding admission to the program, the OIG conducted an audit in 2016 in which it found that SBA did not always document the reasons for approving a firm into the program, particularly when lower level reviewers had identified eligibility concerns and had recommended admission to be denied.³² Specifically, the OIG found that out of the 46 firms that lower level reviewers recommended rejecting, 30 were approved without SBA documenting how the eligibility concerns had been resolved. This lack of documentation made it unclear whether a firm should have been admitted in the first place and resulted in potentially ineligible firms gaining access to 8(a) benefits.³³ Thus, the OIG recommended for the agency to clearly document their justifications for approving or denying applicants into the 8(a) Program when those differed from lower-level recommendations and to provide adequate documentation for those 30 firms. At the request of SBA, a follow-on audit was conducted to determine if the agency had resolved eligibility concerns for the 30 small businesses but only eligibility concerns for 20 businesses had been resolved.³⁴

Oversight deficiencies in continuing eligibility processes

In a recent audit, the OIG reported that SBA also needed to improve safeguards pertaining to its annual reviews and continuing eligibility reviews. In particular, the SBA OIG noted that SBA did not consistently identify indications of ineligibility as part of these reviews, even when those indicators were apparent from the documentation submitted by the 8(a) firm.³⁵ In those instances where the SBA did find eligibility concerns as part of these reviews, the agency did not take action

²⁸ SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REPORT 19-01, REPORT ON THE MOST SERIOUS MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE SMALL BUSINESS ADMINISTRATION IN FISCAL YEAR 2019 (OCT. 2018) [hereinafter SBA OIG 19-01].

²⁹ *Id.*

³⁰ Dilger, *supra*, note 5.

³¹ SBA OIG 19-01, *supra*, note 28.

³² SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REPORT 16-13, SBA’S 8(A) BUSINESS DEVELOPMENT PROGRAM ELIGIBILITY (APR. 2016) [hereinafter SBA OIG 16-13].

³³ *Id.*

³⁴ SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REPORT 17-15, REASSESSMENT OF ELIGIBILITY REQUIREMENTS FOR 30 FIRMS IN SBA’S 8(A) BUSINESS DEVELOPMENT PROGRAM (JULY. 2017) [hereinafter SBA OIG 17-15].

³⁵ SBA OIG 18-22, *supra*, note 3.

to remove ineligible 8(a) firms in a timely matter.³⁶ Finally, the OIG found that SBA did not investigate, through continuing eligibility reviews, credible complaints it received regarding 8(a) firm eligibility and failed to log all complaints.³⁷ As a result, the OIG made eleven recommendations of which SBA's management agreed with seven and partially agreed with four. However, SBA's planned actions only resolved five of them. The Committee continues to monitor the progress of compliance.

Ensuring that SBA is providing effective business development assistance to 8(a) firms

According to the SBA OIG, SBA has made business development assistance more readily available to 8(a) firms by using resource partners like small business development centers, SCORE and procurement technical assistance centers. SBA has also taken additional actions to ensure that program participants' needs are assessed during site visits. Nevertheless, it was concluded that "SBA has not fully implemented an IT system that, among other functionalities, it had designed to aid its monitoring efforts to track 8(a) participants' business development."³⁸ In 2011, SBA spent \$1.9 million in developing an IT system which was never deployed.³⁹ Currently, Certify.gov is the system that SBA intends to use for monitoring purposes but it has limited functionalities.⁴⁰ This hearing will allow Members of the Committee to determine what more the SBA can be doing to effectively administer and deliver an effective 8(a) program.

Economic disadvantage status

As shown in Table 1, in order for an individual to be classified as "economically disadvantaged," SBA considers the applicant's net worth, income, and assets. The net worth threshold is \$250,000 for entry into the program and \$750,000 for continuing eligibility. These thresholds were established by regulation in 1989 and have remained the same since, resulting in legislative initiatives aimed at their increase and including inflation adjustments. Nevertheless, opponents have argued that increasing this limit could allow people that are not truly economically disadvantaged to benefit from the 8(a) program.⁴¹

In 2011, SBA established additional objective standards for the economically disadvantaged definition. However, the OIG contested these standards because they were not based on an economic analysis.⁴² In 2018, a study was conducted to define what "constitutes economic disadvantage" and SBA is currently drafting a proposed rule to address the matter.⁴³ In the meantime, the OIG urges the agency "to develop objective and reasonable criteria for determining the threshold where socially disadvantaged individuals face economic disadvantage due to diminished credit and capital opportunities."⁴⁴ This hearing will allow Members of the Committee

³⁶ *Id.*

³⁷ *Id.*

³⁸ SBA OIG 19-01, *supra*, note 28.

³⁹ SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REPORT 18-01, REPORT ON THE MOST SERIOUS MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE SMALL BUSINESS ADMINISTRATION IN FISCAL YEAR 2018 (OCT. 2017) [hereinafter SBA OIG 18-01].

⁴⁰ SBA OIG 19-01, *supra*, note 28.

⁴¹ Dilger, *supra*, note 5.

⁴² SBA OIG 18-01, *supra*, note 39.

⁴³ SBA OIG 19-01, *supra*, note 28.

⁴⁴ *Id.*

the ability to discuss the need to refine a variety of areas within the 8(a) program to enhance its effectiveness and improve the agency's oversight.

Conclusion

The 8(a) Program was created to level the playing field in the contracting arena for small businesses owned by socially and economically disadvantaged individuals. While it is the hallmark of the small business contracting programs and the oldest managed by SBA, it has multiple areas that require improvements, particularly when it comes to providing proper oversight and ensuring that it has the proper mechanisms and resources to accomplish its mission. This hearing will allow members to learn more about the particularities of the program and hear about these and other issues from the perspective of 8(a) participants.