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| **Publication Date: April 3, 2020**  **Reference:** <https://www.sba.gov/sites/default/files/2020-04/SBA%20IFR%202_1.pdf> | **Paycheck Protection Program**  **Affiliate Rules**  **Interim Final Rule Summary** |
| **Overview**  On April 2, 2020, the Small Business Administration (SBA) issued its Interim Final Rule (Rule) implementing sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Section 1102 of the Act temporarily adds a new type of loan named the “Paycheck Protection Program” (PPP) to the SBA’s existing 7(a) Loan Program, and Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans.  The Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely affected by the Coronavirus Disease 2019 (COVID-19) Emergency Declaration. This Interim Final Rule supplements the initial Interim Final Rule with additional guidance about the application of certain affiliate rules applicable to SBA’s implementation of sections 1102 and 1106 and requests public comment.  **Timing**  Effective Date: This Interim Final Rule is effective on the date of publication in the Federal Register. (As of publication of this summary, the Rule has not been published in the Federal Register).  Applicability Date: This Interim Final Rule covers applications submitted under the Paycheck Protection Program through June 30, 2020, or until the $349,000,000,000 in funding is exhausted.  Comment Period: Comments on this Interim Final Rule must be received within 30 days of publication in the Federal Register. (As of publication of this summary, the Rule has not been published in the Federal Register). Once published, you may submit comments through the Federal eRulemaking Portal: <http://www.regulations.gov>  **Affiliate Rules Generally**  Are affiliates considered together for purposes of determining eligibility?  In most cases, a borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP, in order to try to avoid “double dipping.” Under SBA rules, entities may be considered affiliates of each other based on various factors which include stock ownership, overlapping management, and identity of interest. These rules are detailed further in 13 CFR § 121.301.  In order to help applicants identify other businesses with which they may be affiliated, the PPP Borrower Application Form (SBA Form 2483) requires applicants to list other businesses with which they have common management. The intent is to help them assess whether they have affiliates that should be included in their number of employees reported on the Application Form.  Note that this Rule has no effect on the statutory waivers of the affiliate rules, which remain in full force and effect. Section 7(a)(36)(D)(iv) of the Small Business Act waives the affiliation rules for:   1. Any business concern with not more than 500 employees that is assigned a North American Industry Classification System (NAICS) code beginning with 72; 2. Any business concern assigned a franchise identifier code by the SBA; and 3. Any business concern that receives financial assistance from a company licensed under 15 U.S.C. 681.   How do SBA’s affiliation rules affect my eligibility and apply to me under the PPP?An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined by the SBA (15 U.S.C. 632), or if the entity:   1. Has 500 or fewer employees whose principal place of residence is in the US (except for limited industries that meet applicable SBA employee-based size standards); and 2. Is a tax-exempt 501(c)(3) nonprofit organization, a tax-exempt 501(c)(19) veterans organization, a Tribal business concern under 31(b)(2)(C) of the Small Business Act, or any other business concern.   Note that before the PPP, the nonprofit organizations listed above were not eligible for 7(a) SBA loans; only for-profit small businesses were eligible. The PPP, however, made these nonprofit organizations not only eligible for the PPP loans, but also made them generally subject to the SBA’s affiliation rules. However, the detailed affiliation standards contained in section 121.103 currently do not apply to PPP borrowers, because section 121.103(a)(8) provides that applicants in SBA’s Business Loan Programs (which include the PPP) are instead subject to the affiliation rule contained in 13 CFR 121.301.  **Faith-Based Organizations**  This Final Rule also exempts otherwise qualified faith-based organizations from the SBA’s affiliation rules, where the application of the affiliation rules would substantially burden those organizations’ religious exercise. The Final Rule discusses the SBA’s reasoning in more detail, but some of the reasons provided are:   * The SBA determined that applying the affiliation rules to all faith-based organizations without modification would raise concerns under Religious Freedom Restoration Act (RFRA). The RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion” unless the government can “demonstrate[] that application of the burden” to the person is both “in furtherance of a compelling governmental interest” and “the least restrictive means of furthering that compelling governmental interest.” * Application of the affiliation rules could involve the SBA in questions of church governance in violation of the First Amendment. * Affiliation rules developed in the context of for-profit enterprises could present significant administrative difficulties for faith-based organizations in particular. * The fact that other areas of federal law approach issues analogous to affiliation differently for religious organizations is also a notable consideration.   Accordingly, the SBA’s affiliation rules (including those in 13 CFR part 121) do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity, to any other person, group, organization, or entity that is based on “a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion.”  This includes any relationship to a parent or subsidiary and other applicable aspects having to do with organizational structure or form. A faith-based organization seeking a PPP loan may rely on a reasonable, good-faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision. The SBA will not assess, and will not require participating lenders to assess, the  reasonableness of the faith-based organization’s determination. | |
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