



SBA Information Notice

TO: All SBA Employees

CONTROL NO.: 5000-1388

SUBJECT: New Regulations Governing
Affiliation for SBA Business Loan,
Disaster Loan, and Surety Bond
Guarantee Programs

EFFECTIVE: July 27, 2016

On June 27, 2016, SBA published a final rule that amends the regulations determining size eligibility of small businesses based on affiliation. (81 FR 41423) This modification streamlines, separates, and distinguishes the rules for small business applicants in the **Business Loan, Disaster Loan and Surety Bond Guarantee Programs (“SBG”)** from the rules for government contracting, business development and other programs. The revised regulations governing affiliation for the Business Loan, Disaster Loan and SBG Programs are located at 13 CFR §121.301(f) and will be effective July 27, 2016.

For purposes of this rule, the Business Loan Programs consist of the 7(a) Loan Program, the Microloan Program, the Intermediary Lending Pilot Program (“ILP”), and the Development Company Loan Program (“504 Loan Program”). The Disaster Loan Programs consist of Physical Disaster Business Loans, Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Immediate Disaster Assistance Program loans.

The following summarizes the contents of the new regulations set forth at 13 CFR §121.301(f):

- Affiliation Based on Ownership, §121.301(f)(1). SBA will deem that control exists based on ownership when a person owns or has the power to control more than 50% of the voting equity of a concern. If no one person owns or has the power to control more than 50% of the voting equity of the concern, SBA will deem the Board of Directors or President or Chief Executive Officer (CEO) of the concern (or other officers, managing members, partners, or directors who control the management of the concern) to be in control of the concern.

SBA will deem a minority shareholder to be in control if that individual or entity has the ability, under the concern’s charter, by-laws, or shareholder’s agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

Formerly, SBA required the aggregation of the ownership interests of multiple minority shareholders, or two or more owners whose holdings are equal but less than 50% to determine control when no person owns 50% or more of the voting stock. Instead, the new rule simply determines control to the Board and/or company officers when there is not a majority shareholder with voting rights.

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- Affiliation arising under stock options, convertible securities, and agreements to merge, §121.301(f)(2). SBA will utilize the same general principles of affiliation for this section that are set forth in §121.103(d).
- Affiliation based on management, §121.301(f)(3). SBA will utilize the same general principles of affiliation based on common management set forth in §121.103(e). In addition, SBA has modified the language to clarify that affiliation may also arise where a single individual, concern or entity controls the management of the applicant concern through a management agreement. Details on the types of management agreements that result in determinations of affiliation will be provided in SBA Loan Program Requirements.
- Affiliation based on identity of interest, §121.301(f)(4). SBA will deem that affiliation arises when there is an identity of interest between close relatives (as defined in 13 CFR 120.10), with identical or substantially identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area). SBA is removing other business and third party relationships from the regulation on identity of interest.

The former finding of identity of interest that included unrelated individuals with common investments, and firms economically dependent on one another as being affiliated was removed.

- Affiliation based on franchise and license agreements, §121.301(f)(5). SBA has limited the franchise or license agreement reviews to the applicant franchisee or licensee and the franchisor. No review will be conducted for size based on affiliation for any franchise or license relationship of an affiliate of the applicant. (Note: this does not remove the requirement to determine size based on sales, receipts or employees for the applicant and all affiliates.)

SBA does not consider that franchise or license relationships create affiliation, provided, that the franchisee applicant has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Details on the determination of the franchisee/licensee's right to profit from its efforts and bear the risk of loss commensurate with ownership will be provided in SBA Loan Program Requirements.

Formerly SBA required review of all franchise agreements of all franchises owned by the franchisee, not just the applicant agreement.

- Determining the concern's size, §121.301(f)(6). In determining the concern's size, SBA counts the receipts, employees (§121.201), or net income and net worth (the alternate size standard), if applicable, of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

- Exceptions to affiliation, §121.301(f)(7). This section refers to the existing exceptions set forth in 13 CFR 121.103(b) with no change.
- Affiliation based on totality of circumstances. SBA eliminated the totality of the circumstances criterion, but provided specific guidance in §§121.301(f)(1) and (f)(3) (see above) regarding negative control and management that may otherwise have been considered under a broad and less defined totality of circumstances section.
- SBA eliminated applying affiliation based on a newly organized concern (see §121.103(g)) and joint ventures (see §121.103(h)).

These rules of affiliation are only applicable to the 7(a) Loan Program, Microloan Program, Intermediary Lending Pilot Program, the 504 Loan Program, the Surety Bond Program, and the Disaster Loan Programs identified above.

Lenders or potential borrowers who have questions should contact their local SBA district office. The local SBA district offices may be found at www.sba.gov/about-offices-list/2.

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