

What Are The SBA Rules Regarding Affiliated Companies?

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Important Information to Know If Your Business is Interested in Applying for Relief Under the Paycheck Protection Program of the CARES Act

If you are applying for relief under the Paycheck Protection Program of the CARES Act, it will be important to analyze whether your company may be considered an affiliate of another company. If your company is found to be an affiliate with one or more companies, and the combined size of the companies exceeds the SBA standards, you will not be eligible for the Paycheck Protection Program.

The Interim Final Rule cites and incorporates 13 C.F.R. §121.103(f) of the Small Business Size Regulations. While affiliation can involve a complicated analysis, this blog post will provide a brief overview of the different ways the SBA may find affiliation between companies.

According to 13 C.F.R. §121.103(f), “[c]oncerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party controls or has the power to control both. It does not matter whether the control is exercised, so long as the power to control exists.” The size status, and thus affiliation analysis, is generally determined as of the date of the application.

The SBA may find affiliation based upon:

- **Ownership** – a company is an affiliate of another company if it owns or has the power to control more than 50 percent of the company’s voting equity. A minority shareholder could be in control if, under the company’s governing documents, that shareholder could prevent a quorum or otherwise block actions by the board or shareholders.
- **Stock options, convertible securities and agreements to merge** – the SBA will consider each of these (including agreements to merge that are agreements in principle) to have a present effect on the power to control the company, with some exceptions.
- **Management** – the SBA may find affiliation when the CEO or President (or other officers, managing members, or partners who control the management of the company) also controls the management of one or more other concerns. There may also be affiliation where a single individual, concern or entity that controls the Board of Directors of one concern also controls the board and management of another, including through a management agreement.
- **Identity of Interest**– the SBA finds affiliation when there is an identity of interest between close relatives, with identical or substantially identical business or economic interest (such as operating businesses in the same or similar industry in the same geographical area). This can be rebutted.
- **Franchise and license agreements** – generally, restraints imposed on a franchisee or licensee by its franchise or license agreement will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.

There are some exceptions to affiliation provided for in 13 C.F.R. §121.103. The applicability of those exceptions will depend on the facts of your particular situation.

If your business has questions regarding whether it may be affiliated with another, please feel free to contact the Tucker Arensberg COVID Response Team.