

SBA Issues Additional Guidance On Affiliation Rules Under The Paycheck Protection Program

As previously reported, the Small Business Administration (SBA), in consultation with the Department of Treasury, has separately issued an interim rule on its affiliation rules and Frequently Asked Questions (FAQs) on the Paycheck Protection Program (PPP) under the Coronavirus Aid, Relief and Economic Security Act (CARES Act). The interim rule and FAQs are intended to provide additional guidance to borrowers and lenders on the implementation of the PPP. The SBA indicated that the FAQs would be updated on a regular basis.

On Monday April 13, 2020, the FAQs were updated with two important clarifications on the existing waiver of the affiliation rules for businesses in the restaurant and hospitality sectors and franchisees. Following rollout of the PPP application process on April 3, the scope and applicability of these waivers has led to considerable confusion for borrowers and lenders alike.

Hotels/Restaurants Waiver

Under the CARES Act, any single business entity that is assigned a NAICS code beginning with 72 (including hotels and restaurants) and that employs not more than 500 employees per physical location is eligible to receive a PPP loan. The SBA affiliation rules do not apply to Sector 72 entities that employ not more than a total of 500 employees for purposes of the PPP. As a result, each hotel or restaurant location owned by a parent business that is its own separate legal entity could apply for a separate PPP loan up to a maximum of \$10 million if they employ less than 500 people. In the new FAQs, the SBA provided three examples to illustrate how these affiliation waiver principles are intended to apply in practice.

Example 1: Where a company directly owns multiple restaurants and has no affiliates, that company may apply for a single PPP loan if it employs 500 or fewer employees per location (including at its headquarters), even if the total number of employees employed across all locations is over 500.

Example 2: Where a company wholly owns other restaurant companies each with fewer than 500 employees and, as a result, all those companies are affiliates of one another, all three companies can apply for a separate PPP loan.

Example 3: Where a company wholly owns two other companies, one a restaurant and one a construction company each with 400 employees and, as a result, all those companies are affiliates of one another, only the restaurant is eligible for a PPP loan because it has fewer than 500 employees and the SBA affiliation rules do not apply to that company. However, the waiver of the affiliation rules **does not** apply to the affiliated company in the construction industry. That means the size of the construction company is determined by adding its employees to those of the other two affiliated companies, including the company in the restaurant business.

Example 3, in particular, shows that the SBA is interpreting the Sector 72 affiliation waiver narrowly and that it does not intend to apply that waiver to any businesses outside the hotel or restaurant industry. Companies that had previously applied for a PPP loan and based their eligibility on a broader interpretation of the Sector 72 affiliation waiver, are advised to re-examine their eligibility and potential application of the SBA's affiliation rules and discuss this with their legal counsel and their lenders. As a reminder, the PPP Borrower Application Form requires entities to truthfully attest to their eligibility. The SBA has made clear in the previously released FAQs that it is the responsibility of the borrower to determine which entities (if any) are its affiliates and determine the employee headcount of the borrower and its affiliates. The SBA has also said it will permit lenders to rely on those borrower's certifications.



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Related Practice Areas

- Corporate

Franchise Waiver

In addition to the Sector 72 waiver, the CARES Act waived the affiliation rules for any business concern operating as a franchise that is assigned a franchise identifier code by the administration. In the updated FAQs, SBA clarified that if a franchise brand is listed on the SBA Franchise Directory, each of its franchisees that meets the applicable size standard can apply for a PPP loan. The franchisor does not apply on behalf of its franchisees. The \$10 million cap on PPP loans is a limit per franchisee entity, and each franchisee is limited to one PPP loan. For franchise brands that have been denied listing on the directory because of an affiliation between franchisor and franchisee, those entities may request listing to receive PPP loans. While the SBA will not apply affiliation rules to a franchise brand requesting listing on the directory for purposes of PPP eligibility, SBA said it will confirm whether the brand is otherwise eligible for listing on the directory.
