

## **SBA Issues Affiliate Rules for Paycheck Protection Program**

*Hinckley Allen Corporate & Business*

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The SBA has issued guidance on the affiliation rules (the (“Guidance”) applicable to the implementation of the Paycheck Protection Program (“PPP”). For purposes of determining the number of employees of an applicant to the PPP (which requires an applicant to have no more than 500 employees), the applicant must include employees of “affiliates” as determined under four tests which are a subset of the existing SBA affiliate rules, and largely based upon the ability of one party to control another.

The four tests to determine whether affiliation based on control applies include (1) affiliation based on ownership, (2) affiliation arising under stock options, convertible securities, and agreements to merge, (3) affiliation based on management, and (4) affiliation based on identity of interest (collectively, the “Affiliation Rules”).

### **1. Affiliation Based on Ownership:**

- A concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50% of the concern’s voting equity. The SBA’s Compliance Guide interpreting this affiliation rule indicates that where Company A owns a majority of the voting stock of Companies B, C and D, Company A has the power to control Companies B, C and D. Accordingly, the companies are all affiliated and the number of employees of all four companies will be aggregated in determining the size of any one of them. Where no individual, concern or entity is found to control the applicant, the SBA will generally deem the governing body or management to be in control of the concern.

### **2. Affiliation Arising under Stock Options, Convertible Securities, and Agreements to Merge:**

- In determining size, the SBA considers all equity derivative securities to have been exercised, unless subject to conditions precedent which are incapable of fulfillment, speculative, conjectural or unenforceable or where probability of exercise is remote.

### **3. Affiliation Based on Management:**

- Affiliation arises when (a) an officer or director of the applicant also controls the management of one or more other concerns, (b) a single individual, concern, or entity that controls the Board of Directors or management of one concern also controls the Board of Directors or management of one of more other concerns, and (c) where a single individual, concern or entity controls the management of the applicant concern through a management agreement.

### **4. Affiliation Based on Identity of Interest:**

- Affiliation is presumed when there is an identity of interest between close relatives with identical or substantially identical business or economic interests, however, this presumption is rebuttable.

With respect to religious organizations, interim rules issued by the SBA provide that the relationship of a faith-based

organization to another is not considered an affiliation with the other if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.

The Guidance confirms that the Affiliation Rules are waived with respect to (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a NAICS code beginning with 72; (2) a franchise that is assigned a franchise identifier code by the SBA; and (3) any business concern that receives financial assistance under the Small Business Investment Act of 1958.

The Affiliation Rules clarify that all employees in a consolidated corporate group must be aggregated to determine if any member of the group is eligible to apply for a loan under the PPP. The Affiliation Rules based on common management or identity of interest are more complex and require analysis of an applicant's particular services. Those companies that do not qualify to apply for a PPP loan due to the Affiliation Rules may wish to consider the mid-sized company loan program under the CARES Act, which is available to certain business concerns with between 500 and 10,000 employees.

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