

### **Business Affiliation Rule** (13 CFR 121.103)

#### **The following is subject to additional SBA guidance and clarification of the new PPP SBA 7(a) loan program.**

The SBA established the business affiliation rules for qualifying to be awarded government contracts and SBA loans to establish a fairness into the qualification process so that large companies do not have an unfair advantage over small companies. Generally, two (2) companies are deemed to be “affiliated” when one of the companies has the ability or power to “control” the other. It does not matter whether “control” is exercised, so long as the power to “control” exists. (13 CFR 121.103(a)(1)-(3)).

“Control” is determined as follows:

1. No more than 50% common ownership or “control” of a business.
2. Does economic independence exist between companies? If 70% or more of a company’s receipts are derived from another entity over the prior three years, then control is rebuttably presumed. (13 CFR 121.103(f)(2)).
3. Newly Organized Concern Rule. Affiliation exists when “key employees,” former officers, directors, or principals form a new entity. A “key employee” is defined as:
  - a. One who has a critical influence in or substantive control over the operations or management of the entity; or
  - b. The new entity is in the same or related industry or field of operation as the prior entity, or
  - c. The prior entity feeds the new entity with contracts, financial support, technical assistance, indemnification for a fee or otherwise. (13 CFR 121.103(g)). The SBA presumes affiliation and the newly formed entity will need to rebut the same.
4. Joint Ventures. Joint ventures are presumed affiliated and hence the combined revenue and employees are aggregated. (13 CFR 121.103(h)(1)).

The SBA will examine the “totality of the circumstances” (13 CFR 121.103(a)(5)) to determine ownership and control. This is thought of as a “catch all.” For instance, businesses that share staff, equipment, facilities, contact information, etc., will be deemed affiliated based on such identity of interest.

Under the normal SBA loan programs, business affiliates are aggregated for determining employee count eligibility for SBA loans. Under the PPP, that affiliate test is suspended only for the following industries:

- Businesses with more than one physical location, which do not employ more than 500 employees per physical location, can qualify if their *NAICS Code begins with 72*.

*These are industries in the Hospitality Accommodation Industry (hotels, casinos, etc.), and Food Service and Drinking Places;*

- Any business operating as a franchise, where the SBA assigns a franchise identifier code; and
- Any business that receives financial assistance from an SIBC licensed under Section 301 of the Small Business Investment Act of 1958.

FOR ALL OTHER EMPLOYERS, the normal business affiliation rules still apply for the counting the 500 employees for eligibility.