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SBA Programs Under the CARES Act: 'Affiliation' Interim Final Rules and Guidance

April 4, 2020

A key feature of the CARES Act $2 trillion relief package is the creation of the Paycheck Protection Program (PPP), which authorizes $349 billion for businesses to obtain loans of up to $10 million per applicant to be used on payroll, benefits, rent and other costs from February 15, 2020, through June 30, 2020 to assist during the coronavirus pandemic. The PPP will be administered by the Small Business Administration (SBA) under the umbrella of its 7(a) business loan regime. On April 3, 2020, the Treasury issued interim final rules (Paycheck Protection Program – Interim Final Rule on Affiliation) and associated guidance (Paycheck Protection Program – Applicable Affiliation Rules) on how to determine whether an entity is an affiliate of an applicant for this purpose.

Guidance for PPP loans under SBA

The new guidance effectively reiterates the "control" standards previously communicated in our webinar and other guidance (and Section "301" applies). Namely:

- A holder of more than 50% of an applicant's voting securities *de facto* "controls" the applicant;
- A minority holder (a holder of less than 50% of an applicant's voting securities, but in any amount), will be deemed an affiliate if that minority holder can "control" the applicant (by charter, bylaws or stockholder agreement) by preventing a quorum or otherwise blocking actions by the board or stockholders:
    - Prior SBA case law continues to govern and, accordingly, to the extent a minority holder can block operational (or "ordinary") actions, this will be deemed impermissible control resulting in a determination of affiliation.

If "control" is found between an applicant and a minority holder, all of the controlling holders' employees – and employees of all such holder's affiliates (including portfolio companies of VC holders) will be aggregated with the applicant's employee count in determining eligibility.

For additional information regarding the PPP loan program, please visit our coronavirus resource hub.

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