

## Small Business Administration

## § 121.301

loans), an applicant business concern must satisfy two criteria:

(1) The size of the applicant alone (without affiliates) must not exceed the size standard designated for the industry in which the applicant is primarily engaged; and

(2) The size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, which ever is higher. These size standards are set forth in §121.201.

(b) For Development Company programs and, for the period beginning May 5, 2009 and ending on September 30, 2010, for 7(a) Business Loans, an applicant must meet one of the following standards:

(1) The same standards applicable under paragraph (a) of this section; or

(2) Including its affiliates, tangible net worth not in excess of \$8.5 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$3.0 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's "net income after Federal income taxes" will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (b)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation.

(iii) Sum the results obtained in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(c) For the Small Business Investment Company (SBIC) program, an ap-

plicant must meet one of the following standards:

(1) The same standards applicable under paragraph (a) of this section; or

(2) Including its affiliates, tangible net worth not in excess of \$19.5 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$6.5 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's "net income after Federal income taxes" will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (c)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation.

(iii) Add the results obtained in paragraphs (c)(2)(i) and (c)(2)(ii) of this section.

(d) For Surety Bond Guarantee assistance—a business concern, combined with its affiliates, must meet the size standard for the primary industry in which such business concern, combined with its affiliates, is engaged.

(e) The applicable size standards for purposes of SBA's financial assistance programs, excluding the Surety Bond Guarantee assistance program, are increased by 25% whenever the applicant agrees to use all of the financial assistance within a labor surplus area. Labor surplus areas are listed monthly in the Department of Labor publication "Area Trends in Employment and Unemployment."

(f) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has

the power to control both. It does not matter whether control is exercised, so long as the power to control exists. Affiliation under any of the circumstances described below is sufficient to establish affiliation for applicants for SBA's Business Loan, Disaster Loan, and Surety Bond Programs. For this rule, the Business Loan Programs consist of the 7(a) Loan Program, the Microloan Program, the Intermediary Lending Pilot Program, and the Development Company Loan Program ("504 Loan Program"). The Disaster Loan Programs consist of Physical Disaster Business Loans, Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Immediate Disaster Assistance Program loans. The following principles apply for the Business Loan, Disaster Loan, and Surety Bond Guarantee Programs:

(1) *Affiliation based on ownership.* For determining affiliation based on equity ownership, a concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50 percent of the concern's voting equity. If no individual, concern, or entity is found to control, SBA will deem the Board of Directors or President or Chief Executive Officer (CEO) (or other officers, managing members, or partners who control the management of the concern) to be in control of the concern. SBA will deem a minority shareholder to be in control, if that individual or entity has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

(2) *Affiliation arising under stock options, convertible securities, and agreements to merge.* (i) In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(ii) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agree-

ments in principle" and are thus not given present effect.

(iii) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

(iv) An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns', or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

(3) *Affiliation based on management.* Affiliation arises where the CEO or President of the applicant concern (or other officers, managing members, or partners who control the management of the concern) also controls the management of one or more other concerns. Affiliation also arises where 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. Affiliation also arises 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 arises when there is an identity of interest between close relatives, as defined in 13 CFR 120.10, with identical or substantially, identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area). Where SBA determines that interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

(5) *Affiliation based on franchise and license agreements.* The restraints imposed on a franchisee or licensee by its

franchise or license agreement generally will not be considered in determining whether the franchisor or licensor is affiliated with an applicant franchisee or licensee provided the applicant franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. SBA will only consider the franchise or license agreements of the applicant concern.

(6) *Determining the concern's size.* In determining the concern's size, SBA counts the receipts, employees (§121.201), or the alternate size standard (if applicable) of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

(7) *Exceptions to affiliation.* For exceptions to affiliation, see 13 CFR 121.103(b).

[61 FR 3286, Jan. 31, 1996, as amended at 66 FR 30648, June 7, 2001; 67 FR 3056, Jan. 23, 2002; 69 FR 29204, May 21, 2004; 70 FR 69047, 69052, Nov. 14, 2005; 70 FR 72594, Dec. 6, 2005; 71 FR 62208, Oct. 24, 2006; 73 FR 41254, July 18, 2008; 74 FR 20580, May 5, 2009; 74 FR 36110, July 22, 2009; 75 FR 48550, Aug. 11, 2010; 79 FR 33669, June 12, 2014; 79 FR 71296, Dec. 2, 2014; 81 FR 41428, June 27, 2016]

#### § 121.302 When does SBA determine the size status of an applicant?

(a) The size status of an applicant for SBA financial assistance is determined as of the date the application for financial assistance is accepted for processing by SBA, except for applications under the Preferred Lenders Program (PLP), the Disaster Loan program, the SBIC program, and the New Markets Venture Capital (NMCV) program.

(b) For the Preferred Lenders program, size is determined as of the date of approval of the loan by the Preferred Lender.

(c) For disaster loan assistance (other than physical disaster loans), size status is determined as of the date the disaster commenced, as set forth in the Disaster Declaration. For pre-disaster mitigation loans, size status is determined as of the date SBA accepts a complete Pre-Disaster Mitigation Small Business Loan Application for processing. Refer to §123.408 of this chapter to find out what SBA considers

to be a complete Pre-Disaster Mitigation Small Business Loan Application.

(d) For financial assistance from an SBIC licensee or an NMVC company, size is determined as of the date a concern's application is accepted for processing by the SBIC or the NMVC company.

(e) Changes in size after the applicable date when size is determined will not disqualify an applicant for assistance.

[61 FR 3286, Jan. 31, 1996, as amended at 64 FR 48276, Sept. 3, 1999; 67 FR 11880, Mar. 15, 2002; 67 FR 62337, Oct. 7, 2002; 69 FR 29204, May 21, 2004; 70 FR 72594, Dec. 6, 2005; 73 FR 41254, July 18, 2008; 75 FR 48550, Aug. 11, 2010; 79 FR 33669, June 12, 2014]

#### § 121.303 What size procedures are used by SBA before it makes a formal size determination?

(a) A concern that submits an application for financial assistance is deemed to have certified that it is small under the applicable size standard. SBA may question the concern's status based on information supplied in the application or from any other source.

(b) A small business investment company, a development company, a surety bond company, or a preferred lender may accept as true the size information provided by an applicant, unless credible evidence to the contrary is apparent.

(c) Size is initially considered by the individual with final financial assistance authority. This is not a formal size determination. A formal determination may be requested prior to a denial of eligibility based on size.

(d) An applicant may request a formal size determination when assistance has been denied for size ineligibility. Except for disaster loan eligibility, a request for a formal size determination must be made to the Government Contracting Area Director serving the area in which the headquarters of the applicant is located, regardless of the location of the parent company or affiliates. For disaster loan assistance, the request for a size determination must be made to the Area Director for the Disaster Area Office which denied the assistance.